

1 IN THE CIRCUIT COURT OF DESOTO COUNTY, MISSISSIPPI  
2  
3 KAY T. NUNNALLY, INDIVIDUALLY  
4 AND ON BEHALF OF ALL WRONGFUL  
5 DEATH BENEFICIARIES OF JOSEPH  
6 LEE NUNNALLY, DECEASED PLAINTIFF

7 V. CIVIL ACTION NO. CV92-270-CD  
8  
9 R. J. REYNOLDS TOBACCO  
10 COMPANY AND BASIC FOODS, INC. DEFENDANTS

11 VOLUME 6  
12 DAILY COPY TRIAL PROCEEDINGS

13 DATE: 6/30/00

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1 (Jury enters courtroom.)  
2 JUDGE CARLSON: Good morning, ladies and  
3 gentlemen. It's good to see you again. I hope you  
4 got rested up and are ready to go forward now.  
5 Since you have had the overnight recess, I need to  
6 find out again if you've had occasion to discuss the  
7 case with anyone, anybody made an effort to talk  
8 with you about the case, any outside information  
9 gained about the case, anything you need to bring to  
10 my attention? If not, then, we're ready to go  
11 forward Mr. Merkel.  
12 MR. MERKEL: Your Honor, we would call  
13 Kay Nunnally.  
14 KAY NUNNALLY,  
15 having been first duly sworn, was examined and  
16 testified as follows:  
17 DIRECT EXAMINATION BY MR. MERKEL:

18 MR. MERKEL: Be careful of that chair.  
19 Q. (By Mr. Merkel) Ms. Nunnally, would you  
20 identify yourself for the Court and the jury,  
21 please?  
22 A. Kay Thomas Nunnally.  
23 Q. Have you ever been in court as a witness  
24 before, Kay?  
25 A. No, I have not.

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1 Q. Just try to keep your voice up. The  
2 noises is in here, and everyone needs to hear you.  
3 Tell the jury, if you would, something about  
4 yourself first, Kay. Where did you grow up?  
5 A. I grew up in [DELETED]. I was born in  
6 Bossier City, Louisiana. But we moved to the  
7 [DELETED] area when I was 3rd grade.  
8 Q. And --  
9 A. And lived there --  
10 Q. Go ahead, I'm sorry?  
11 A. And lived there until I was about 25, I  
12 think.  
13 Q. And how old are you today?  
14 A. 48.  
15 Q. And that would make you born in 1952?  
16 A. 1951.  
17 Q. Now, tell us about your education, and  
18 the level you reached in high school, college or  
19 whatever.  
20 A. I went through all six grades of junior  
21 high, high school. And I went to about a  
22 year-and-a-half of college at Blue Mountain College  
23 and went to probably two semesters at Memphis State  
24 at various times.

25 Q. And where was your high school completed?

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1 A. Hillcrest High School in [DELETED].  
2 Q. Now, at what point in time, Kay, did you  
3 meet your husband, Joe Nunnally?  
4 A. Seems like it was either September or  
5 October of about '74.  
6 Q. And what were you and he doing at the  
7 time you met?  
8 A. I helped open up the McDonald's that they  
9 opened on State Line road at that time. And he was  
10 transferred in as an assistant manager within a  
11 week, or two or three weeks afterwards.  
12 Q. So you were both employed by the  
13 McDonald's corporation?  
14 A. Correct.  
15 Q. How long had you worked for McDonald's?  
16 A. That was my first time to have worked for  
17 them when I helped open that store.  
18 Q. And before that, tell us a little bit  
19 about the type of work activities that you had had.  
20 A. I worked at a little place called the  
21 Chicken Hut that was on Melbranch road at Shelby  
22 Drive. That was the a little fast food place. I  
23 don't -- I probably worked for my parents somewhere  
24 between there. I don't remember exactly all the  
25 jobs.

1339

1 Q. What kind of things would you have done  
2 for your parents? What business or endeavor did

3 they have?

4 A. My father had an office supply store in  
5 the [DELETED] area. My mother owned a dress store  
6 in the Southgate area, South 3rd.

7 Q. Now, when Joe Nunnally came to the  
8 McDonald's place as an assistant manager, how long  
9 was he there before you and he began seeing each  
10 other, other than as coemployees at that position?

11 A. Somewhere around March or April of that  
12 next year.

13 Q. And you were ultimately married when?

14 A. About a year-and-a-half later in '56,  
15 September of '56.

16 Q. Tell the jury, if you would, Kay, a  
17 little bit about Joe at that time, as you met him  
18 what his personality was like, what kind of employee  
19 he was for McDonald's? Just give us a little bit  
20 of -- we've been talking about him during this whole  
21 thing, and nobody knows anything about him other  
22 than a name.

23 A. Well, when I met him, I enjoyed working  
24 under him because he was so energetic and very  
25 conscientious of his customers, and very  
1340

1 conscientious of how the product was presented to  
2 the customers. Didn't like having old products  
3 sitting around and always made sure that the got  
4 pulled if it had been there too long. I know other  
5 people enjoyed working under him. He was the kind  
6 of was -- he wasn't a bossy boss. Anything he asked  
7 you to do, you just would do it very willing because  
8 of the way he presented it to you.

9 He'd always say do you the mind doing  
10 this or could you help me get this done, something  
11 like that. He was very energetic, very personable  
12 to people. He always cared about the was his  
13 customers were. And how things were going in the  
14 store, and if everything was going all right for the  
15 customer.

16 Q. All right. Just off the job, his  
17 personality and so forth, how would you describe  
18 him?

19 A. Oh, he was fun to be with once we start  
20 dating. I can remember, we'd go play pool  
21 somewhere, meet some of his friends. We'd go to his  
22 friends' houses that were married at the time and  
23 enjoyed being with them. Anywhere we went, he'd  
24 always grab me by the hand and say come on, let's go  
25 over here and do this. He enjoyed plays. He  
1341

1 enjoyed movies. He enjoyed going to concerts that  
2 were local -- not local, but the popular bands and  
3 groups that came in town.

4 Q. Do you know where he had been before  
5 coming to McDonald's, where he had lived, and what  
6 he had been doing prior to that?

7 A. No, I didn't know him before then.

8 Q. Okay. As far as Joe's level of  
9 education, what was that? What did you understand  
10 that to be?

11 A. He graduated from high school, and he was  
12 in college a few years also.

13 Q. Did he get a college degree?

14 A. No, he did not.  
15 Q. Now, after you and -- well, let me back  
16 up. When you first met him, was he smoking  
17 cigarettes?  
18 A. Yes, he was.  
19 Q. And to what extent would you say? How  
20 would you describe it?  
21 A. When I first met him, I don't know how  
22 much, because I wasn't around him that much. We  
23 were in the workplace only at the time.  
24 Q. And did McDonald's have any rules as far  
25 as smoking in the -- in the area there where the  
1342  
1 food and the customers were?  
2 A. You could not work in the food  
3 preparation area. You could go out in the lobby and  
4 smoke. And he could smoke back where his office  
5 was.  
6 Q. Okay. After you got to dating him and an  
7 opportunity to be around him more, what did you  
8 observe about his smoking habits?  
9 A. He smoked quite a bit. I sometimes  
10 wondered how he got a clean breath of air, he smoked  
11 so much.  
12 Q. And what brand is he smoke?  
13 A. Salem.  
14 Q. Did you ever smoke?  
15 A. Yes, I did.  
16 Q. And when did that start with you, Kay?  
17 A. I was in high school, probably somewhere  
18 around 7th, or 9th grade.  
19 Q. And to what extent did you ever take up  
20 the habit?  
21 A. I smoked probably a pack every two days.  
22 Q. And that continued from 7th, 8th, 9th  
23 grade up to when?  
24 A. Until I quit, somewhere around '77, '78.  
25 Q. And what caused you to quit?  
1343  
1 A. It was a strange reason. It hurt my  
2 teeth. It put my teeth on edge or just made them  
3 real sensitive. And I just had to quit because it  
4 made my teeth hurt so bad.  
5 Q. And this pain in the teeth, was it just  
6 when you drew smoke or air in through the cigarette,  
7 or was it all the time when you were smoking?  
8 A. I've just got tender teeth, and I guess,  
9 eventually, it just got to the fact -- it just hurt  
10 my teeth for some reason. I don't know.  
11 Q. Okay. So you were smoking at the time  
12 you met Joe?  
13 A. Yes, I was.  
14 Q. And then quit a couple of years after  
15 that.  
16 A. Yes.  
17 Q. How difficult was it for you to quit?  
18 A. Well, I didn't ever pick any up to smoke  
19 again. It wasn't the easiest thing to do. I had to  
20 play some reverse psychology on myself. And just  
21 tell myself that I didn't like them. I didn't want  
22 them, they stank, they made everything around me  
23 stink. And I just tried to convince myself from  
24 moment to moment, just don't ever pick that one back

25 up. If you ever pick it up, and light one, you'll  
1344

1 be smoking again. That was my way of quitting.  
2 Just keep telling myself, I didn't want them, I  
3 didn't like them, I didn't want to smoke them  
4 anymore.

5 Q. Why did you start in the first place?

6 A. I guess I thought just like most kids did  
7 that it was real cool.

8 Q. Where did you get that idea, that it was  
9 cool or the thing to do?

10 A. I imagine from the ads. From other kids  
11 smoking. They seemed to be real popular.

12 Q. Let me show you some documents, Kay.  
13 I'll show you some documents that -- I think they  
14 all bear Exhibit P-13, and then they have sub-parts.  
15 (Exhibit P-13 marked for identification.)

16 Q. (By Mr. Merkel) It looks like A, B --  
17 looks like they are 13, A through Q. If you would  
18 take a moment, Kay, and leaf through that stack, if  
19 you would.

20 A. (Examining.)

21 Q. Do you recognize those ads, Kay?

22 A. I remember seeing ads like that when I  
23 was young.

24 Q. Are they typical of ads that were the  
25 being run when you were 13, 14-years-old?

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1 A. I believe so.

2 Q. And what about those would be appealing?  
3 I mean, if you'd look at some of those, what in  
4 those made you, as a teenager, want to take up  
5 smoking cigarettes?

6 A. Well, it seems to be happy, good looking,  
7 successful people. Something that you want to  
8 emulate.

9 Q. What percentage of your crowd, your  
10 friends took up to some degree or the other smoking  
11 at about that same era?

12 A. I would say I know my two best friends  
13 smoked. And I think we all started probably about  
14 the same time. I don't remember otherwise, too many  
15 others I ran around with.

16 MR. MERKEL: Your Honor, we would offer  
17 at this time into evidence, Plaintiffs' Exhibit P-13  
18 and its sub-parts.

19 MR. ULMER: Your Honor, we object to it.  
20 We object to it on the basis of relevancy.

21 JUDGE CARLSON: The objection will be  
22 noted. It will be overruled, and marked and  
23 received into evidence.

24 (P-13 entered into evidence.)

25 MR. MERKEL: Your Honor, might we pass

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1 these to the jury at that time?

2 JUDGE CARLSON: Yes, sir.

3 MR. MERKEL: If they passed it one as a  
4 time as they got through, it might be a quicker way  
5 to --

6 JUDGE CARLSON: Yes.

7 (Jury examines Exhibit P-13 A through Q.)

8 Q. (By Mr. Merkel) Kay, after you and Joe  
9 began seeing each other, did you continue to work at

10 McDonald's under him?  
11 A. No, I didn't work there after about -- I  
12 think I worked there maybe two months.  
13 Q. So you quit before you and he ever began  
14 to date?  
15 A. Yes, I sure did.  
16 Q. And what did you do after that?  
17 A. I think I was working at a place called  
18 ITT American Electric. They're real close to his  
19 store.  
20 Q. Okay. And after you and he married, tell  
21 the jury a little bit about the things that you did.  
22 The way you -- your daily lives were, what you  
23 enjoyed for recreation when you were off work and  
24 that type of thing before kids came along.  
25 A. Well, we both worked. So that was our

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1 daily routine as far as getting up and going to  
2 work. He worked night shift for McDonald's some,  
3 depending on what his schedule was. We both bowled  
4 on McDonald's bowling league. I think we did that  
5 for a couple of years. He and I both would go play  
6 pool at different places. Go to movies, do what  
7 most couples do. Have some parties at our house, go  
8 to friend's houses when they had parties or  
9 gatherings.

10 Q. How long was it before children began --  
11 became a consideration?

12 A. We had our first child in '79, July, so  
13 that was just right at two years, I believe, maybe  
14 three.

15 Q. And what was the first child?

16 A. A boy.

17 Q. And his name?

18 A. Kable.

19 Q. And tell the jury, if you would, Kay, how  
20 was -- how did Joe like fatherhood? How did he take  
21 to being a father?

22 A. Well, I know when I first told him I was  
23 pregnant, he was just ecstatic. He just couldn't  
24 believe it. And when we had Kable, I can remember  
25 him carrying him around on his arm like this, kind

1348  
1 of like a little puppy dog. Just laying him out on  
2 his hand. He was real proud of him.

3 When the baby got older, and Joe would be  
4 at work, I was off work. I wasn't working at the  
5 time. I've had take Kable in, and we'd go see him  
6 at work, at McDonald's, visit with him a little bit.  
7 The kids all learned how to sip through a straw at  
8 McDonald's and eat little French fries like most  
9 kids do.

10 Q. At McDonald's, what was Joe's duties?  
11 What was his daily routine like down there?

12 A. By the time we had our first child, he  
13 was the manager. And his duties was to run that  
14 store and to have assistant managers under him. And  
15 I think they had -- I don't know if they called them  
16 "leads," but the people under the assistant  
17 managers, the people that helped with different  
18 things that went on around the store.

19 Sometimes opened the store, other times,  
20 he closed the store. I think once a month they had

21 inventory they had to do. And about every six  
22 months or a year, they had a large inspection that  
23 he would be in charge of getting the store  
24 completely cleaned up, painted, scrubbed down,  
25 everything fixed. Everything in great working order

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1 so that when they were inspected by their McDonald's  
2 team in Memphis, the store would pass that  
3 inspection.

4 Q. How many hours a day did the manager  
5 spend flipping hamburgers?

6 A. I don't know how much actual time a  
7 manager, himself, spent fixing hamburgers. I think  
8 most of the time, they were in the wrapping part  
9 between the counter and where the hamburgers came  
10 up. And they presented the food, most of the time,  
11 to the customer or made sure that the girls on the  
12 line and the boys that were on the line had the  
13 food. And it was the ready to be given to them.

14 Q. McDonald's have any little charcoal  
15 burners sitting around inside the store?

16 A. Not that I know of, not that I know of.

17 Q. How long between children? When did your  
18 next child come along, Kay?

19 A. April of '81.

20 Q. And what was that child?

21 A. That was a boy again.

22 Q. And his name?

23 A. Levi. Joe was tickled to death to have  
24 another boy. He just couldn't believe it, that he  
25 had two boys. And because he's from a family of

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1 boys, and the Nunnally side seems to have nothing  
2 but boys, I think he was kind of resigned to the  
3 fact that boys was all he was going to get, too.

4 Q. What did he do with these boys when he  
5 would come home at night, and on the weekends and  
6 all? What were the types of things he and the boys  
7 did when they were small?

8 A. Well, with them young like that, we used  
9 to take them to baseball games. McDonald's usually  
10 had tickets available to go see Chicks' games. And  
11 when they were up a little bit older, walking  
12 around, we took them to ball games. I think there  
13 were some soccer teams that were franchised in  
14 Memphis for a while. We took them to those.  
15 Because he and I enjoyed sports, so we took them to  
16 whatever we went to.

17 Q. Did you and Joe play sports? I think you  
18 said you played pool and bowled. Did you do any  
19 other type of team sports?

20 A. At the time, I don't remember us doing  
21 team sports until the children were older.

22 Q. Okay. Now, we've talked about the two  
23 boys. When did the next one arrive?

24 A. August of '82, had a little girl. And he  
25 was thrilled that he had a little girl. And she was

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1 the apple of his eye.

2 Q. And what was her name, Kay?

3 A. He named her after both the grandmothers,  
4 Marion Lucille. And I told him he'd make a  
5 grandmother real mad if he named her -- if we call



6 her just one of the two names. So we combined the  
7 two names for a nickname and called her Marcille.

8 Q. What kind of things did he do with her?  
9 I'm sure with a girl child, it would be a little  
10 different?

11 A. Well, two brothers ahead of her, she  
12 tried to stay up with them. But he was -- I think  
13 she was more partial to him. Just -- she treated  
14 him like he was the only person in the world for a  
15 long time. When she was an infant, she wouldn't  
16 even give me sugar. Daddy was her -- the boys were  
17 mine, kind of. And I think that's a normal thing  
18 for babies. Boys kind of cling to moms. And little  
19 girls cling to their daddys.

20 And she'd go -- when she got up walking  
21 around, she'd go get his slippers when he came in at  
22 night. She'd make sure he had anything he wanted.  
23 He doted on her, too. That was his little girl.  
24 He'd get her up on his lap. And they'd play and do  
25 things. He'd kind of sing to them. He told me not  
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1 to sing to them, because I don't have a very good  
2 voice. I'd sing nursery rhymes, anyway.

3 Q. At that time Kable would have been five  
4 or six?

5 A. He probably just turned five, I think.

6 Q. When did the boys begin playing little  
7 team sports, boy's baseball, or the soccer or the  
8 organized type things?

9 A. I think Kable may have been in second  
10 grade when all of them started playing team sports.

11 Q. And what all did they play? What did  
12 they participate in?

13 A. Well, they played church softball, and  
14 played soccer with the Desoto County Soccer  
15 Association.

16 Q. Did you and Joe participate in those  
17 activities with them to any extent?

18 A. The first year they played, we were just  
19 parents on the sideline. The second year, I helped  
20 coach one of the age groups. Joe would come watch  
21 their games at nighttime.

22 They had a lot of Saturday games. That  
23 he was mostly scheduled to work on Saturdays, so he  
24 didn't get to see the those, unless he could come  
25 watch one that was scheduled early enough.  
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1 Q. Did you and he know soccer? Had you  
2 played as -- as young people yourself or --

3 A. I had taken a college course, that was  
4 one of our four or six weeks things. And our coach  
5 or teacher took us out on this huge field, threw the  
6 ball out there. And said run down there with the  
7 ball and run back, and I thought that was kind of a  
8 silly game to play at the time.

9 Q. How did you learn the rules well enough  
10 to coach it?

11 A. Well, when my children started playing  
12 the first year, I just liked the involvement that  
13 all of the team had on it. It was -- all the kids  
14 were involved. Whereas in baseball, you get them  
15 out on the outfield somewhere, and it's mostly the  
16 pitcher, catcher doing everything. Soccer, at least

17 they're all getting to run around. And in the  
18 younger age group, under six and eight, they're like  
19 little bumblebees, everybody just goes all over the  
20 place.

21 Q. Did your three, by the time they reached  
22 ages they could play in that, did they enjoy sports  
23 like that?

24 A. Yes, they did, all three of them played.

25 Q. Marcille athletic and involved in those

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1 types of things?

2 A. Marcille was out there doing just as much  
3 as what the boys were doing. And they played on  
4 coed teams at the time, where the boys and girls  
5 played together in each age group.

6 Q. By the time the children got old enough  
7 to -- that you didn't have to watch them constantly  
8 or take care of all their -- their basic needs, what  
9 did the family do as far as vacations, or trips or  
10 things of that sort?

11 A. Most of our trips were spent going on  
12 soccer tournaments. With all three of them playing  
13 at the time, the tournaments would be held in the  
14 fall and in the spring, also. And as far as time  
15 off from work and finances, also, that would just  
16 about take care of what we might have had to take a  
17 large vacation. And some of those tournaments were  
18 held in places where there were theme parks or other  
19 things that you could take advantage of while you  
20 were there.

21 Q. During the summer months, what did your  
22 family do together as far as recreation or  
23 entertainment?

24 A. Well, we had a boat, and we had camping  
25 gear. And we took the kids camping to Arkabutla,

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1 and Enid and Sardis. Most of the time, it was  
2 Arkabutla because it was very close, very  
3 convenient. It didn't take much time to drive to,  
4 and get tents set up and ready to go.

5 Q. How often did you go on those camping  
6 trips?

7 A. I'd say about every other weekend. Joe  
8 would have to work pretty long on Saturday. I would  
9 load everything up, have everything we needed. Have  
10 the kids and go get our camp site, so we'd have a  
11 pretty good one. And as soon as he'd get off work,  
12 he'd get down there a little bit before it got dark.

13 Q. Okay. And then finally, you had a fourth  
14 child. When was that?

15 A. That was in October of '84.

16 Q. And what was --

17 A. Her name was B. K. Joe named her after  
18 me, Brenda Kay Thomas Nunnally. And he had a friend  
19 named K. B. that he liked calling people by  
20 initials. So that's what he wanted to call her was  
21 B. K.

22 Q. By the time the children were at various  
23 ages growing up on into the '80s, what were Joe's  
24 smoking habits at that point, Kay?

25 A. He was smoking fairly heavy. I would say

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1 he smoked in the house with us, he smoked in the

2 car. At that time, I don't know that anyone was  
3 putting any restrictions anywhere for smoking,  
4 restaurants, or in businesses or anything else. And  
5 I guess everybody just kind of went along as usual.  
6 Smoke -- everybody had been smoking, smoked in the  
7 house, and he continued to smoke, just like he had  
8 been.

9 Q. Did you ever try to keep him from smoking  
10 in the house, or in the car or anything like that?

11 A. No, I don't recall ever trying to get him  
12 to not smoke in the house. At the time, he was the  
13 bread winner. It was his house. He was paying the  
14 bills, and I felt like that was the his right. That  
15 if he didn't want to smoke in the house, he would be  
16 the one to make that decision.

17 Q. Did you -- at this point in your life,  
18 were you working any outside the home while these  
19 children were coming along, two, four, six, so on?

20 A. When Marcille came along, that's the last  
21 time I worked outside the home.

22 Q. So you went back to work after each of  
23 the boys?

24 A. Yes. I think Kable was a year old when I  
25 went back to work. I worked while Levi was a baby

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1 up until about two months before Marcille was born.

2 Q. And then after her birth, you never went  
3 back to work again during Joe's life?

4 A. Correct.

5 Q. Why was that?

6 A. He and I both wanted us to have me at  
7 home to raise the kids and take care of the  
8 children. Make sure that they had what they needed,  
9 and financially putting three children in day care,  
10 I'd have worked just to have them in day care. So I  
11 might as well stay home and take care of them  
12 myself.

13 Q. What kind of earnings was Joe bringing  
14 home during that period of time? And I'm talking  
15 about from '77, '78 on up through B. K.'s birth.

16 A. I would say he was probably making  
17 somewhere -- I want to say either 22,000 or 32,000.  
18 I don't really remember.

19 Q. We have the actual records, but I just  
20 was interested in the general -- general range of  
21 it. Were you, and the children and he comfortable  
22 on what he was able to bring home?

23 A. I believe we were.

24 Q. Had to watch some of it, but no problem  
25 getting by?

1358  
1 A. Well, like anyone else, you budget and  
2 try to put aside stuff so you can have little extra  
3 things to do like going to the ball games and things  
4 like that. I don't remember us having so much extra  
5 to put aside that we could have a large savings or  
6 anything.

7 Q. When, Kay, did you first begin to notice  
8 something wrong with Joe?

9 A. Probably the spring of '88. He seemed to  
10 be having -- just as I look back on it, just things  
11 that were going on. That at the time I never paid  
12 any attention to it and never took it into account.

13 But his skin was getting really scalely, and he  
14 seemed to be coughing some.  
15 Q. Up until that time, had he been one that  
16 frequently coughed, one of these hacking, morning  
17 type coughs?  
18 A. Not that I can recall. He was a very  
19 healthy individual. I don't know that he hardly  
20 ever missed work for anything.  
21 Q. Up until the spring of '88 that you're  
22 talking about, how was his energy level?  
23 A. His energy level probably was about the  
24 same. I don't remember him -- his energy level  
25 declining. It's real hard --

1359

1 Q. Did he still, as far as his work hours  
2 and work habits, had they changed any at that point?  
3 A. No, he still worked just like he had been  
4 working.  
5 Q. Now, at some point he had a job change  
6 from McDonald's, didn't he?  
7 A. Yes, he did.  
8 Q. When was that?  
9 A. '84, he started, I believe the day I came  
10 home from the hospital with B. K., he started a new  
11 job with Champion TV Rentals.  
12 Q. What did that job entail? What did he do  
13 there on a daily basis?  
14 A. When he started there, he started off as  
15 a salesman on the floor just selling rental TVs and  
16 furniture to customers that came through the door.  
17 Q. And did he subsequently get promotions  
18 and change his position?  
19 A. He became a manager of a store within a  
20 few months. And then within a year or two, he  
21 became a supervisor over the stores that were in the  
22 Memphis area.  
23 Q. Was he paid on a salary or standard  
24 compensation there, or was there any commission  
25 involved?

1360

1 A. Just straight salary while he was a  
2 manager and while he was a supervisor.  
3 Q. And about what level of salary did he  
4 reach there, approximately?  
5 A. Seems like it was about 42,000.  
6 Q. Now, after you began to notice these  
7 changes, the skin problems and so forth, how did it  
8 progress? How did his condition, as you could  
9 observe it, continue before he finally saw a doctor?  
10 A. Seems like he did go to a dermatologist  
11 trying to clear his skin up. Because it looked like  
12 he had been sunburned and was peeling from sunburn  
13 basically, is what it looked like.  
14 I think at that time, I don't remember  
15 the time frame when he went to see the  
16 dermatologist. But she told him, after he had seen  
17 her a couple of times, that he needed to go have a  
18 physical, probably, that there might be something  
19 else wrong that was causing the skin to do like it  
20 was doing. Because she couldn't clear it up.  
21 Q. And did he follow her advice and go -- go  
22 for another --  
23 A. I don't remember how long it took him

24 before he finally did. He had -- of course, he was  
25 working all this time. So he has to schedule all

1361

1 these in between his schedule at work.

2 Q. And who did he finally go to?

3 A. I think he went to Dr. McLatchey in  
4 Southhaven and had a physical done there.

5 Q. And when was the first time, Kay, that  
6 anyone suggested to Joe and you that there might be  
7 something seriously wrong?

8 A. I think when he went to Dr. McLatchey,  
9 they may have treated him for bronchitis or  
10 something, because of the cough. And I think when  
11 that didn't clear up with antibiotics, I think then  
12 Dr. McLatchey did a x-ray and saw something that he  
13 didn't like. And told him he needed to go into  
14 [DELETED] and see one of the doctors up there.

15 Q. And did he do that?

16 A. He did. I don't remember what time frame  
17 that was, either.

18 Q. Tell the jury, if you would, please, Kay,  
19 about learning the diagnosis that he had?

20 A. Well, he was -- I think when the doctors  
21 in [DELETED] just saw him in their office, they  
22 confirmed that there was something in the lungs.  
23 And they wanted to hospitalize him, and see if they  
24 could check into it further. I remember he was in  
25 the hospital during Thanksgiving time.

1362

1 And I think he was in there several days  
2 when he called me one morning and told me that they  
3 had gotten some of the test results back, and the  
4 doctor thought it was cancer. Not only did that  
5 upset me pretty bad, it upset me that the doctors  
6 didn't wait for me to get in there so that there'd  
7 be somebody in there with him when they told him.

8 Q. How did he take that news?

9 A. He took it real hard, same as I did.  
10 He -- after -- after that point in time, we just  
11 asked the doctors, you know, what would be done, and  
12 how it would be taken care of to try to treat it.

13 Q. And what were you -- what did they tell  
14 you as far as a general course of treatment what to  
15 expect?

16 A. I think at the time the doctors talked to  
17 him they said they had to go through a protocol,  
18 which I had no idea what that was at the time of how  
19 to set up treatment, check and find out what kind of  
20 cancer it was. Do a biopsy, do whatever they needed  
21 to so they'd know what was there, and how to treat  
22 it, and what kind of attack they would make on the  
23 cancer, itself.

24 Q. And how long did it take before they  
25 actually began to try and attack the cancer?

1363

1 A. I think he was out of the hospital  
2 probably a week or so later. I -- time frame wise,  
3 I just don't remember. They started doing radiation  
4 on him in the lung area, and I remember I went to  
5 some of those with him. Some of them he would leave  
6 work, go to radiation, and come back home or go to  
7 work, depending on what time of day he had been  
8 scheduled to have his radiation.

9 Q. How did that make him -- did that affect  
10 him in any way, the radiation treatment?

11 A. He said it made him tired. And the area  
12 where they radiated was tender, but he kept working  
13 irregardless. His answer was I have a family I  
14 still have to provide for. As long as I can work,  
15 I'm going to work.

16 Q. What did they -- what was your  
17 understanding as to his prognosis after the doctors  
18 had made their diagnostic studies? How was it  
19 painted as far as you understanding it?

20 A. That there wasn't a cure. That  
21 basically, he would die from this.

22 Q. Was that communicated to the children?

23 A. Yes, it was.

24 Q. Who did that?

25 A. Joe did.

1364

1 Q. What did he tell them, and how did he try  
2 to make them understand?

3 A. Well, we sat outside of Methodist  
4 Hospital there in [DELETED], just out on the grass.  
5 And he just told the children -- we had decided at  
6 the very beginning to be very honest with them.  
7 That it would be better to be honest with them, and  
8 let them know what was going on than to not let them  
9 know what was going on.

10 And what the possibilities were, and he,  
11 himself, told them that he had a disease, he had  
12 a -- I don't remember if he told them he had a tumor  
13 in his lung -- but he did tell them he had a disease  
14 that the doctors had found. And that he would die  
15 from it. He didn't know when, he didn't know how  
16 long it would take. But that he knew that it would  
17 kill him in the end.

18 Q. How was that received by the children?

19 A. Well, they started asking him questions.  
20 I don't remember exactly what. I think maybe asking  
21 him, you know, well, are you going to be in the  
22 hospital anymore and when are you going to get to  
23 come home? How long will it be, and do we get to  
24 come see you while you're in the hospital?

25 Q. The radiation therapy lasted how long,

1365

1 Kay?

2 A. Seems like from December to the end of  
3 February, maybe mid-February.

4 Q. Of 1989?

5 A. Of '89, yes.

6 Q. And then what was done at the doctor's  
7 prescription or advice?

8 A. Well, at the time, I think Joe had asked  
9 them about operating. Because at the time they were  
10 trying to use the radiation to reduce or at least  
11 stop the growth of the tumor. And one doctor he saw  
12 in Memphis said that he wouldn't operate. I don't  
13 remember why he said he wouldn't. So we started  
14 checking into other places that we could go that  
15 might would have the expertise and the experience in  
16 doing the type surgery that needed to be done.

17 Q. Where did you end up?

18 A. Houston.

19 Q. At what clinic?

20 A. M. B. Anderson or something like that.  
21 Q. What type of facility is that? What is  
22 their specialty?  
23 A. I believe it's cardio and pulmonary  
24 specialist. I'm not sure. It was a long time ago.  
25 Q. And what did they do after Joe went to

1366

1 Houston?  
2 A. He went out there by himself at first.  
3 He flew out. They did tests and ran different  
4 things to see if the tumor would be operable. He  
5 called me and told me that they were going to do the  
6 operation. And so at that point in time, I found  
7 places that my children could stay so that the I  
8 could fly out and be with him. We had friends, and  
9 neighbors and a lot of family around us that the  
10 kids could stay with. I think my sister-in-law kept  
11 all four of them for a few days. And then give  
12 friends and relatives kept them while we were out  
13 there.

14 Q. How long were you and he there for the  
15 surgery?

16 A. I think we were out there for six weeks.

17 Q. Describe, just from your standpoint, what  
18 you could observe about the surgery. What did it do  
19 as far as Joe's concerned. I know you don't know  
20 what they did inside. But as far as the severity of  
21 it, and where the incisions were and what his  
22 recuperative period was like.

23 A. Well -- oh, that's hard to remember, too.  
24 I know they went in and took this upper lobe -- it  
25 seemed like they came in after surgery. He was in

1367

1 intensive care after surgery for several days. I  
2 don't remember at what point in time they moved him  
3 into his own room. But once they did move him into  
4 his own room, they came in and took the x-rays of  
5 him every single day, I believe.

6 He had tubes running out for drainage and  
7 this, that and the other. And he was fairly  
8 immobile for a while. I don't remember exactly for  
9 how long.

10 Q. As far as, once he got out of intensive  
11 care and you were able to stay with him, what was  
12 his condition as far as discomfort, and pain and his  
13 mental state at that point?

14 A. I think he was fairly hopeful that --  
15 that they had gotten all the cancer. The x-rays  
16 were taken to -- to make sure, I guess, that as the  
17 time he was in there they could tell if anything  
18 else was developing. His mood seemed to be okay.  
19 He was ready to get on -- he had a fax brought in so  
20 he could stay in communication with his stores. And  
21 make sure that things were going like they needed to  
22 go. He wanted to make sure that things were being  
23 done like they needed to be done, and that the  
24 people were staying on top of things and taking care  
25 of customers.

1368

1 Q. How long was it after the surgery,  
2 itself, before he was able to get up, and ambulate  
3 and tend to his own needs and so forth?

4 A. It was the probably a couple of weeks. I

5 think -- I don't remember when the last tubes were  
6 taken out. But it seems like once the last tubes  
7 were taken out, he did a lot better.  
8 Q. And you did then come back home, you and  
9 he?  
10 A. Yes, we did.  
11 Q. When did you get back?  
12 A. I don't remember the day we got back. I  
13 know we both flew in, and the family was there at  
14 the airport to meet us.  
15 Q. Tell us about the period after his return  
16 from Houston and the surgery. Did you go back to  
17 work full-time?  
18 A. Well, when he first got home, it took him  
19 a good week to kind of get -- regain his strength  
20 from traveling and pretty much being on his own.  
21 And he started going back to work for a few hours a  
22 day and kind of worked his way up to half a day.  
23 Then he started -- within, I imagine, three or four  
24 weeks, he was working full-time again as much as he  
25 could. I don't think he was putting any overtime

1369

1 in.  
2 Q. And as far as when he came home, was he  
3 just knocked out? Was he able to function at home,  
4 and if so, how did you and the children spend those  
5 hours at home?  
6 A. He was pretty tired by the time he came  
7 home. Seem like we just stayed around the house and  
8 watched TV.  
9 Q. Did things go pretty well for a while?  
10 A. There for a while, he seemed to be  
11 getting stronger, and building his strength up, able  
12 to do a little bit more.  
13 Q. When did things begin to go the other  
14 way?  
15 A. He probably noticed them a lot sooner and  
16 I did. He had a trip that he went on with officials  
17 or higher ups from his company, Champion, to check  
18 out carrying a new line of -- not a new line of TVs,  
19 but just a new line for them to have. I don't  
20 remember where they went. But he came back and was  
21 just very distraught at the fact that he was so  
22 concerned with trying to hold himself up to stay --  
23 keep his feet steady under him that he couldn't  
24 hardly pay attention to what they were even  
25 discussing or talking about. And from that point

1370

1 on, his -- his health and everything just went down  
2 hill.  
3 Q. Did he reach a point where he did not  
4 even go into the office again?  
5 A. I think when he went back into the  
6 hospital July 18th, he -- when he came out of the  
7 hospital then, he went in and cleaned his desk out.  
8 Q. What was the July 18th hospitalization  
9 about? What caused that?  
10 A. The pain that he was having in his back,  
11 mainly, was so severe, he just couldn't stand it any  
12 longer. And he asked me to take him to the  
13 hospital, which at that point, we went to the  
14 hospital and stayed in the emergency room at the  
15 [DELETED] Hospital for several hours



16 before they were able to get him back. And at that  
17 point in time, they admitted him again to the  
18 hospital.

19 Q. How long had he had that pain in his  
20 back?

21 A. From whenever he had gone on that trip  
22 and come back, he was -- he had had pain. Seems  
23 like that trip was somewhere in June.

24 Q. After going back in the hospital, what  
25 did you learn then about his condition?

1371

1 A. The cancer had come back.

2 Q. And where was it?

3 A. It had spread, it had metastasized.

4 Q. After he cleaned out his desk, Kay, tell  
5 us -- tell us what you can about the period from  
6 then until final events, as far as his activities  
7 with you and the children.

8 A. Well, he was in a battle to stay alive,  
9 basically. That was his daily thing is to do all he  
10 could to stay alive. Of course, he was taking chemo  
11 from that point on. They prescribed chemo. So he  
12 would go to the hospital and have chemo treatments.  
13 Come home and be at home for a while, and then go  
14 back for the prescribed chemo again whenever the  
15 doctors had set it --

16 Q. How did the chemo affect him?

17 A. Well, it wiped him out.

18 Q. Did you see any visible effects of it?

19 A. Weight loss, loss of hair, sick.

20 Q. Was he nauseous?

21 A. Yes, he was nauseous.

22 Q. How were his spirits now by this point?

23 A. Pretty down. I think he knew that before  
24 where he may have had hope, he probably had no hope  
25 now.

1372

1 Q. Were the children aware of how he was  
2 deteriorating?

3 A. I don't think at their young age they  
4 realized to the point of what he was deteriorating.  
5 I know they could tell he had quite a bit of weight  
6 loss.

7 Q. The family, then, I think finally went to  
8 Florida for a trip, did they not?

9 A. Correct. My sister had had a condominium  
10 that she and a friend were renting. And for some  
11 reason or another, the lady that was going to rent  
12 it to them was going to be out of it a couple of  
13 days early, so she had already invited us to go.  
14 Just to go down for a few days and relax and take  
15 the kids to the beach.

16 And when it came up empty several days  
17 earlier, she asked us if we wanted to go ahead and  
18 go down and take those few days for ourselves, and  
19 we did. And when we got everything packed up, the  
20 kids were real excited, and I was excited. Joe was  
21 excited, because he was getting to get out. And he  
22 had continued to get out in public, as far as going  
23 to the store or anything else. But we drove to  
24 Florida. I think he started off driving and  
25 eventually just couldn't do it, so I drove the

1373

1 remainder of the way.  
2 Q. Tell us about what happened after you got  
3 there.  
4 A. Well, when we first got there, all of us  
5 helped get everything out of the van and into the  
6 condominium. Got ourselves set up and our stuff  
7 where we wanted it. Everybody's rooms picked out,  
8 and who was going to be where. It was an upstairs  
9 and a downstairs. It seems like Joe and I had a  
10 room that was facing right out at the ocean. And  
11 the kids had the -- I think the girls were in the  
12 room beside ours. And it seems like we put the boys  
13 downstairs, and that's where they were going to stay  
14 until my sister and her friend came.  
15 Once we got set up, we went out on the  
16 little porch that was there. We walked up and down  
17 the beach. I think the next morning when we got up,  
18 we took the kids into the Panama City area and  
19 bought them some goggles, and fins, and sand buckets  
20 and stuff for them to play out on the beach with,  
21 beach ball, other things.  
22 Q. Was Joe able to go out with them on the  
23 beach, or did he stay in the house?  
24 A. I don't remember after that very first  
25 day him going out on the beach.

1374

1 Q. And then happened what happened?  
2 A. Seems like that first day we did go out  
3 and walk around the beach a little bit.  
4 Q. And what then happened?  
5 A. Well, I think my sister and them got in  
6 town on a Friday. And if I remember correctly, I  
7 had cooked breakfast that morning, and fed the kids  
8 and sent them out to play on the beach close to  
9 where the condominium was. Had taken Joe up his  
10 breakfast. He ate a fairly good breakfast, if I  
11 remember correctly. While he ate, I sat at the  
12 window and watched the kids so that -- because they  
13 were very young, and I didn't want them going out  
14 into the water.  
15 I just told them they could go out there  
16 and play on the beach area. So I was -- he asked me  
17 while I was doing that, he said, well, what are you  
18 doing? I said well, I'm watching all my babies, the  
19 ones down here and the one over here. After that  
20 point in time, he -- I think maybe it was lunch  
21 time, I called the kids in, he came downstairs also.  
22 After they ate, they went back outside and spent  
23 some more time outside.

24 Joe, I think, went and laid down on the  
25 couch there in the downstairs area that was on the

1375

1 beach side. My sister and them had arrived. They  
2 took the kids out on the beach and went out in the  
3 water with them. Walked them up and down the beach  
4 looking at the different things that were going on.  
5 The para-sails, the big old wheel things that the  
6 people ride out in the ocean on, the trike things.  
7 And just all of a sudden, Joe started  
8 having a lot of trouble. He'd been sleeping a lot  
9 once he came downstairs, but I remember I had gone  
10 to the restroom. He had called me name, and I told  
11 him just a minute, I'll be there in just a minute.

12 It didn't seem like it was very long, he called my  
13 name again, and I told him again that I'd be there  
14 just as quick as I could. And when I came out of  
15 the bathroom, he was already -- I don't know what he  
16 was doing.

17 I just remember I called out the back  
18 door to the neighbors that were beside us to call  
19 the ambulance. That something was wrong with my  
20 husband, and that I needed an ambulance. And from  
21 that point in time, they came in with me, and we  
22 started doing CPR and mouth-to-mouth.

23 Q. Was he unconscious when you came out of  
24 the bathroom?

25 A. It seems like he had just started

1376

1 throwing up and all. I don't remember -- I don't  
2 know. It was just --

3 Q. Was he ever revived after that?

4 A. I remember as the paramedics were working  
5 on him, and as they took him to the hospital that  
6 they worked on him the entire time. When they got  
7 him to the emergency room, I didn't watch what they  
8 were doing. But they continued to work on him to  
9 try to revive him. And at one point in time, I know  
10 I had told the paramedics and all through the whole  
11 thing that he had lung cancer. So that they'd be  
12 aware of what kind of condition he had, and how they  
13 might need to have treated it.

14 I remember the physician from the  
15 emergency room came in and told me at one time  
16 that -- I don't remember if they had him fully  
17 revived or at what point in time -- but I just told  
18 them that we had discussed at one time that if  
19 anything were to kill him besides him just literally  
20 deteriorating from the cancer, itself, to not -- not  
21 revive him, that he did not want that. He didn't  
22 want to like be in a car crash, or something else  
23 happen and then keep him alive just so that,  
24 eventually, he was going to die anyway. That if a  
25 quick end came, that that's -- that's what -- he

1377

1 wanted to be left at that.

2 Q. So he died there in Florida?

3 A. Yes, he did.

4 Q. And the date of that was what?

5 A. September 1st, 1989.

6 Q. Kay, after the arrangements and funeral  
7 and so forth, what did -- turning to you, we've been  
8 talking about him and his situation. How did you  
9 evaluate your situation at that point?

10 A. Well, I had four children that I was  
11 going to have to take care of and bring up. That I  
12 was going to have to provide for them.

13 Q. Did you have a job at that point or any  
14 prospects of a job?

15 A. At that time, no, I did not have a job.  
16 Joe's uncle owned some horses. And Joe and I had  
17 bought some land together when we first married.  
18 And his uncle said that he would love to be able to  
19 bring his horses to one place, because he had them  
20 spread out different areas being trained and showed  
21 and other things.

22 And that if I wanted to take care of his

23 horses for him, that he would bring them to our  
24 place, and that would give me a job. That he would  
25 pay me to take care of that while he -- just to

1378

1 supplement my income, because you do receive Social  
2 Security income.

3 Q. How did the children react to his loss,  
4 the different ones?

5 A. Well, initially, when I had to come home  
6 from the hospital and tell them, they all cried  
7 except for B. K. I think she laughed. She was  
8 about three or four. She didn't quite understand  
9 the gravity of it until I told her. And I told her  
10 and the other three that -- when I came back from  
11 the hospital that daddy had died. That he had gone  
12 to live with Jesus in heaven. And that's when they  
13 started crying, and we all had a real good cry for a  
14 long time.

15 And then, children being children,  
16 they -- once they got over -- over their initial  
17 cry, they proceeded to go back to their activities  
18 slowly. Once we got home, I think we all pretty  
19 much stayed at home and didn't do a whole lot for  
20 about a week, maybe a week-and-a-half.

21 I was a coach of a soccer team at that  
22 time, so I proceeded to tell the children that we  
23 needed to get back to going to school. They needed  
24 to be back in classes and not missing anymore. They  
25 needed to be back playing soccer, occupying their

1379

1 time instead of being at home. So we tried to go  
2 back to our activities as much as we possibly could.

3 Q. Did you get other jobs in addition to the  
4 one caring for the -- for the horses?

5 A. Not until about 1993, and that was  
6 probably October, December, somewhere like that.

7 Q. And at that time, were you still doing  
8 the horses?

9 A. Yes, I was.

10 Q. And what else did you take on?

11 A. I started working at Bally's casino.

12 Q. Were you able to -- from the standpoint  
13 of what the illness had done, did you have any  
14 savings left as far as you and Joe?

15 A. No, I didn't have any savings at all that  
16 I remember after that point in time.

17 Q. What was the status of medical bills?

18 A. They were high. I don't remember  
19 exactly -- I don't remember an exact figure of how  
20 high they were. But I know they were really high.  
21 Insurance from his company had taken care of it very  
22 well, as far as their part of it.

23 Q. The part that was remaining, what did you  
24 do about that?

25 A. I tried to pay as much as I possibly

1380

1 could to each one that we owed. To at least, in  
2 good faith, let them know that I was trying to pay  
3 them back.

4 Q. I'm going to show you Exhibit P-2 and ask  
5 you if you would just quickly flip through that.

6 (Exhibit 2 marked for identification.)

7 Q. Or you can look at the summary page on

8 the front I think might be the easiest.  
9 A. (Examining.)  
10 Q. What is that booklet? What does it  
11 contain, Kay?  
12 A. It looks like it has a list of all of the  
13 doctors and pathologists, drugs, all the different  
14 doctors and specialists.  
15 Q. And then behind it are there actual --  
16 A. The bills from different, like Houston  
17 Radiology.  
18 Q. Okay.  
19 MR. MERKEL: Your Honor, we would offer  
20 at this time, Plaintiff's Exhibit P-2, and it's my  
21 understanding that -- well, there's one item in the  
22 booklet, item 14, that was a child's bill rather  
23 than that. That's been taken out of the Exhibit.  
24 And I think the parties have agreed with the total  
25 amount; is that --  
1381  
1 MR. ULMER: I think that's right. We  
2 don't object, Your Honor, if that's the total of all  
3 the medical bills incurred as in the treatment of  
4 Joe Nunnally?  
5 MR. MERKEL: I think that's right, Your  
6 Honor.  
7 MR. MERKEL: And the amount, Your Honor,  
8 is 38,473.72, and that is with the \$150 pediatrician  
9 bill being excluded.  
10 JUDGE CARLSON: I understand there is no  
11 objection.  
12 MR. ULMER: There is none, Your Honor.  
13 JUDGE CARLSON: Then it will be marked  
14 and received into evidence.  
15 (Exhibit P-2 entered into evidence.)  
16 Q. (By Mr. Merkel) Hand you Exhibit P-7,  
17 Kay, ask you what that is?  
18 (Exhibit 7 marked for identification.)  
19 A. This is a letter I drew up myself to send  
20 to people we owed money to. Saying I was Joe's  
21 wife, and I was handling the debts incurred by Joe  
22 and what his diagnosis was and that --  
23 MR. ULMER: Your Honor, we object to  
24 this, and maybe if I could tender my copy to the  
25 Court, it would make it quicker. We object on the  
1382  
1 basis of 402 and 403, hearsay.  
2 JUDGE CARLSON: What's the purpose of  
3 offering it?  
4 MR. MERKEL: Just to show, Your Honor,  
5 what she had to do in the way of taking care of the  
6 debts that had piled up and accumulated.  
7 JUDGE CARLSON: I'll sustain the  
8 objection. I don't think it would be appropriate.  
9 Q. (By Mr. Merkel) Without regard to the  
10 introduction of the document, what did you offer to  
11 do and do?  
12 A. I offered to pay \$10.00 to everybody that  
13 was owed. And as each bill, smaller ones were paid  
14 off, I would split that \$10.00 between the next  
15 groups that were left. And just whittle it down  
16 until it was paid off.  
17 Q. And did you ultimately take care of those  
18 bills?

19 A. I believe so.

20 Q. How did you, now working and having a  
21 two-year old at home, what did you do about child  
22 care, or a three-year-old, I guess?

23 A. She was able to go with me. She went to  
24 kindergarten. And she'd get picked up and brought  
25 to me out at the -- where the horses were and where  
1383

1 we took care of them. And she'd just be out there  
2 playing. There was a lady that worked with me, and  
3 her son was out there, so they played together. But  
4 she spent most of her day with me.

5 And when we finished up for the day and  
6 it was time for the others to be home from school,  
7 we tried to get home just as quick as when they the  
8 got home from school. They, thankfully went to a  
9 school that was within walking distance of the  
10 house.

11 Q. How were times for the next several years  
12 after Joe's death?

13 A. Well, the first year, very, very tough  
14 emotionally. We did have Social Security coming in,  
15 and I made what I -- the little bit I did taking  
16 care of the horses. Emotionally for me, it was very  
17 rough. I think the children rebounded fairly well,  
18 as far as adjusting to the way things were. I  
19 called it my "blue funk period." Just wake up one  
20 day and just not feeling like getting out of bed.

21 But knowing that everybody had to the get  
22 up and go to school, have to get them ready, just  
23 real hard. I was a person that used to just love to  
24 get up early in the morning. I used to get up early  
25 in the morning when I had my own horses across the  
1384

1 street from us. I'd get up at 5 or 6:00 o'clock in  
2 the morning, go ride horses, come home, get ready  
3 and go to work. I knew when I woke up in the  
4 morning from there on that I shouldered the  
5 responsibility of everything that went on in our  
6 house.

7 Q. How long did that period that you've  
8 described as a blue funk continue?

9 A. I'd say probably a good year, and anyone  
10 that was lost anybody very close to them, I think  
11 they can probably agree with me that it's a grieving  
12 process that you just have to go through. And then  
13 as time goes by, those feelings of loss seemed to  
14 taper. And there for another couple of years, you'd  
15 just go through short periods of that blue funk, as  
16 I call it. Or other days when you wake up and  
17 you're in a bad mood. And you don't care whether  
18 you're in a bad mood. You want to be in a bad mood,  
19 and you don't want anybody to try to get you out of  
20 your bad mood. You don't want to be cheered up.  
21 You want to be just left alone.

22 Q. Was it tough handling the normal problems  
23 of -- I guess by now, Kable is a teenager?

24 A. Up until about 7th and 8th grade for him,  
25 the children, themselves, weren't too hard to  
1385

1 handle. Even Kable was not too hard to handle at  
2 that time. His grades weren't real good from 7th  
3 and 8th grade. He had done real well in elementary

4 school. And then all of a sudden, his grades -- he  
5 just didn't care anything about school at all.

6 Q. Before Joe became ill, who was the  
7 disciplinarian around the house? If somebody had to  
8 straighten out a situation, who did it?

9 A. I was the main disciplinarian. I was at  
10 home with them all the time. I never held the idea  
11 of when your daddy gets home, he's going to take  
12 care of you real good because you didn't mind me. I  
13 didn't think that was real fair to a father to the  
14 make them come home, and not know what had been  
15 going on and have to come down on the kids. But  
16 when he was at home, he made sure they behaved. He  
17 made sure that they didn't back talk me. He backed  
18 me up in anything that was done or decided, he  
19 backed me up in what that was -- decision was as far  
20 as their discipline.

21 Q. What about grades at school, if suddenly  
22 somebody started missing homework or the grades  
23 fell, what was his position in that situation?

24 A. Well, at the time while he was at home  
25 with us, he made sure that their -- that they knew

1386  
1 how important school was. That they knew that they  
2 needed to work to their potential to make as good a  
3 grades as what they could.

4 Q. As far as instilling a work ethic,  
5 importance of work in doing your best, what was his  
6 relationship with the children in that regard?

7 A. I think they knew from just the fact that  
8 he got up, and went to work and was enthusiastic  
9 about his job, and he won several awards while he  
10 was with Champion for out selling any other salesman  
11 or manager in the whole organization.

12 Q. Did he involve the children in his work  
13 from time to time?

14 A. Yes, he did. When he started working for  
15 Champion, and once he became a manager, he started  
16 taking them one at a time, having them dress nice  
17 and neat. And he would take one of them to work  
18 with him, let them stay at the store. Let them go  
19 eat lunch with him, and he kept them with him all  
20 day long.

21 Q. After you began working at Bally's, did  
22 you continue doing the two jobs, the horses and  
23 Bally's?

24 A. Well, the horses were my love. I enjoyed  
25 doing that. I had had horses before Joe's uncle

1387  
1 even gave us any. And yes, I'd go to work at  
2 Bally's. On my way home, since it was in that  
3 direction, I could feed on the way home, take care  
4 of anything that needed to be taken care of, and  
5 then go home. A lot of times on the weekends, kids  
6 and I would spend time out there. Gather hay, have  
7 to go pick hay up. Bring hay to the barn. Put the  
8 hay up, and they helped with that.

9 Q. How long did that continue, both of those  
10 jobs?

11 A. I think I started working at Southhaven  
12 Supply, in '95.

13 Q. So at that time, you were doing how many  
14 jobs?

15 A. Well, I quit Bally's and started working  
16 at Southhaven Supply. Still had the horses, and  
17 still have the horses now. Probably worked at  
18 Southhaven Supply full-time for about two or three  
19 months.

20 Q. And then what?

21 A. Bally's had closed and had moved their  
22 boat and was reopening. And when they opened back  
23 up, I went back with Bally's, because I needed the  
24 insurance that the job at Bally's provided.

25 Q. Okay. And what about, did you work any  
1388

1 other jobs other than the horses and Bally's?

2 A. I continued to work at Southhaven Supply  
3 part-time.

4 Q. And how many hours a week would you put  
5 in at Southhaven Supply?

6 A. It worked out to be about 40 hours a  
7 month.

8 Q. And how many hours at Bally's?

9 A. A full 40-hour work week.

10 Q. So you were working, in essence, 50 hours  
11 a week at the two jobs, plus the horses?

12 A. Possibly, yes. The horses were still, at  
13 that time, mainly just go feed them, make sure they  
14 had water, make sure they were okay, and then come  
15 home.

16 Q. As the children continued to grow and the  
17 oldest, Kable, finished high school, what did he do  
18 about his education then?

19 A. He entered Northwest Community College in  
20 Desoto County.

21 Q. And is he still in?

22 A. He went up until he was out for the  
23 summer, this summer.

24 Q. So as far as last May or whenever the  
25 school semester shut down, he was still --  
1389

1 A. He was a student until the end of the  
2 recess.

3 Q. How about Levi?

4 A. Levi started college at Ittawamba  
5 Community College last fall. And he was a full-time  
6 student up through May. He's off for the summer.

7 Q. And the girls?

8 A. They were full-time high school students  
9 from fall through May.

10 Q. Does B. K. have any memory of her father?

11 A. Very, very little.

12 Q. She would have been how old at his death?

13 A. At his death, she was four.

14 Q. Where is she now, this week?

15 A. Right now, she's at summer camp near  
16 Nashville.

17 Q. And how long will she be there?

18 A. She'll be there for another week.  
19 She'll -- it's a five-week camp is what it is.

20 Q. Have you remarried, Kay?

21 A. No, I have not.

22 Q. If you can, describe your feelings about  
23 the loss and what you were faced with just in  
24 general. As far as, just selfishly, how you felt  
25 about things yourself, what your plight was.



1390

1 A. Well, it would be real hard for me to  
2 provide for my children the same way as what Joe  
3 would be able to provide for them. He had -- being  
4 in management positions, of course -- made fairly  
5 good money for that time. Me, I'd always been just  
6 a normal worker, just an on-the-clock employee,  
7 still am. To come home and try to get them to their  
8 activities. I felt like I was meeting myself coming  
9 and going a whole lot of the times.

10 I'd take one and drop them off at a  
11 practice when I knew there were other parents and  
12 people there so that they wouldn't be by themselves.  
13 Take the next one to theirs, make sure they had  
14 someone that would be there and check and make sure  
15 someone could give them a ride home. Which most of  
16 the time people were very willing to help me out on  
17 that part of it. While I was coaching, I, of  
18 course, had to make sure that while the others are  
19 taken care of, the one whose team I just happened to  
20 be coaching at the time, I made sure, you know, that  
21 we finished up and could get home and be at home  
22 when the others got home or shortly thereafter.

23 They took care of getting their homework  
24 and other things done while I took care of house  
25 cleaning and cooking. If they had questions about

1391

1 homework or whatever, I tried to take care of that  
2 as best as I could.

3 Q. Were the children aware of the shortages  
4 and the problems in the family unit?

5 A. I don't think so.

6 Q. You were able to let them keep up with  
7 the crowds they were with and --

8 A. I think I pretty well maintained that  
9 they got to continue doing what they had done while  
10 their daddy was alive. And provided the things for  
11 them that -- that kept things pretty much the same  
12 as much as possible. I know one of my sons said  
13 once when he said something about I didn't come  
14 watch any of his soccer games.

15 And it kind of hurt my feelings, and I  
16 said Levi, if there's just one of me, and I watch  
17 half of your game and I know you have a ride home,  
18 and I know Marcille doesn't have a ride home, then I  
19 need to watch the last half of her game. So I can  
20 make sure I get her at home also. And I don't think  
21 as young as they were they realized the juggling act  
22 that was going on. And that we did without some  
23 things in order to have the other things that they  
24 did want.

25 Q. I want to hand you three photographs that  
1392

1 have been identified as Plaintiff's Exhibit P-3, A,  
2 B and C. And ask if you would, Kay, to look at  
3 those, please.

4 (Exhibit P-3 marked for identification.)

5 Q. What are the photographs, each of them?

6 A. Two of them of the family, and one of  
7 them is Joe --

8 Q. Can you date them for us, tell us when  
9 they were taken? It may be on the back of them. If  
10 not approximately --

11 A. This one of Joe, by himself, was taken by  
12 his brother about 1977. His brother was a  
13 photographer. This one of the -- the larger one  
14 here is of the family. B. K. looks like she's about  
15 a year. So that would be about 1985, probably taken  
16 in the fall. It was August of '86, so she's about  
17 two-years-old. And this other one, she must be  
18 three taken in 1988.

19 MR. MERKEL: Your Honor, we would offer  
20 Exhibit P-3 and its three sub-parts, A, B, C at this  
21 time.

22 MR. ULMER: No objection, Your Honor.

23 JUDGE CARLSON: It will be marked and  
24 received into evidence. And ladies and gentlemen,  
25 we've been in place right at an hour-and-a-half.

1393

1 Let's go ahead and take a short break at this time.

2 (Exhibits P-3, A, B and C entered into  
3 evidence.)

4 (A short break was taken.)

5 JUDGE CARLSON: I'll mention to you the  
6 clerk told me they were still trying to get out of  
7 the restroom.

8 (Jury enters courtroom.)

9 JUDGE CARLSON: Mr. Merkel.

10 Q. (By Mr. Merkel) Kay, when we were asking  
11 about the the children earlier, I believe that you  
12 gave us the year of Kable's birth. But what is his  
13 birth date?

14 A. July 18th, '79.

15 Q. '79. And I'll show you Exhibit P-18.  
16 (Exhibit 18 marked for identification.)

17 Q. And ask you if you would look at that and  
18 if you can identify it, tell us, please, what that  
19 is?

20 A. It's a check for \$514 dated February 14th  
21 of '89.

22 Q. And to who?

23 A. Joe or Kay Nunnally, paid to Northwest  
24 Airlines from Joe and Kay Nunnally.

25 Q. And what did that trip have to do with?

1394

1 A. That was an airline ticket for going to  
2 Houston.

3 MR. MERKEL: We would offer that at this  
4 time, Your Honor.

5 MR. ULMER: No objection, Your Honor.

6 JUDGE CARLSON: Let it be marked and  
7 received into evidence.

8 (Exhibit P-18 entered into evidence.)

9 MR. MERKEL: With that, Your Honor, we  
10 tender the witness.

11 CROSS EXAMINATION BY MR. ULMER:

12 Q. Hello, Mrs. Nunnally.

13 A. Hi.

14 Q. You met Joe Nunnally, I believe, in  
15 approximately 1974.

16 A. Yes.

17 Q. And before, you don't know anything about  
18 Joe's smoking history before 1974, before you met  
19 him, do you?

20 A. No.

21 Q. You don't know why he started or when he

22 started, anything of that nature?  
23 A. No, I don't.  
24 Q. And you do know, though, do you not, that  
25 both of his parents smoked?  
1395  
1 A. Yes, I do.  
2 Q. Okay. And in fact, I believe that his  
3 mother is Marion Nunnally is her name?  
4 A. Correct.  
5 Q. And in some interrogatory answers -- and  
6 she's been in the courtroom some, I believe, hasn't  
7 she?  
8 A. Yes, sir, yes, sir, she has.  
9 Q. She was -- I think her date of birth is  
10 10/23/22, which would make her about 78 years of age  
11 at this time?  
12 A. Correct.  
13 Q. And Mrs. Nunnally quit smoking --  
14 Mrs. Marion Nunnally quit smoking in, what, about  
15 1985?  
16 A. I think so, somewhere around there.  
17 Q. And Joe Nunnally's dad, James G.  
18 Nunnally, indicated he was born 6/11/17, and he died  
19 in 1999, I believe?  
20 A. Yes, sir.  
21 Q. And he died at the age of 82?  
22 A. Yes, sir, I believe so.  
23 Q. And Mr. James G. Nunnally, Joe's father,  
24 he was a smoker?  
25 A. Correct.  
1396  
1 Q. And he smoked up until about 1985 as  
2 well?  
3 A. Correct.  
4 Q. So both Mr. and Mrs. Nunnally, the father  
5 and mother of Joe Nunnally, they both smoked. And  
6 they both quit about four years before Joe Nunnally  
7 died?  
8 A. Right about, I would guess, '85, that  
9 would be about right.  
10 JUDGE CARLSON: Excuse me, ma'am, maybe  
11 if you could pull that mic up. You're real soft  
12 spoken.  
13 Q. (By Mr. Ulmer) Mrs. Nunnally, when you  
14 were around Joe Nunnally's mom, Ms. Marion Nunnally,  
15 did she ever refer to cigarettes in any particular  
16 fashion?  
17 A. I don't remember her referring to them,  
18 other than cigarettes that I remember.  
19 Q. Okay. Now, let's change our focus a  
20 little bit. We talked about before 1974 and what  
21 caused Joe Nunnally to smoke or not cause him to  
22 smoke. And let's focus now on the time period after  
23 you met Mr. Nunnally in 1974. He was a smoker then?  
24 A. Yes, he was.  
25 Q. And you indicated to Mr. Merkel that he  
1397  
1 smoked Salem cigarettes?  
2 A. Correct.  
3 Q. And he smoked Salem cigarettes only as  
4 long as you knew him up until about a year before  
5 his diagnosis with cancer?  
6 A. Correct.

7 Q. And then about a year before he was  
8 diagnosed with cancer, I believe you told us that he  
9 switched to Doral?  
10 A. I believe that's right.  
11 Q. Now, was it -- and I'm confused about  
12 this, and I don't know that it makes a lot of  
13 difference. But was it Salem or Salem Light. You  
14 indicated before it was Salem Light. And today it  
15 was Salem. Again, I don't know which, so you can  
16 tell me?  
17 A. Salem, if he went to a Salem Light later  
18 on, I don't remember whether it was Salem Light.  
19 Q. Okay. So he was a smoker of Salem  
20 cigarettes?  
21 A. Right.  
22 Q. Now, Joe Nunnally enjoyed smoking?  
23 A. Yes.  
24 Q. And I think you described it in your  
25 deposition that he loved it.

1398

1 A. He did. I think most smokers do.  
2 Q. Now, at any point before Joe Nunnally was  
3 diagnosed with cancer in November of 1988, did he  
4 ever try to quit smoking that you know about?  
5 A. Not that I know of.  
6 Q. Now, let's talk about you just for a  
7 minute or two. You've told the jury that you  
8 started smoking, I think, in about 1966 and stopped  
9 in about 1977, something on that order?  
10 A. Correct.  
11 Q. And what brand did you smoke?  
12 A. Salem.  
13 Q. And you quit for the reasons you've  
14 already described to the jury, it was unpleasant to  
15 your teeth.  
16 A. Right.  
17 Q. And you indicated, I think, that you did  
18 not have a lot of trouble quitting?  
19 A. Well, I didn't say I didn't have trouble.  
20 You spend everyday convincing yourself not to smoke  
21 a cigarette. To just not pick up that one and light  
22 it.  
23 Q. I think you told the jury that you used  
24 kind of a form of reverse psychology?  
25 A. Psychology, yes, I did.

1399

1 Q. Now, your son, Kable Nunnally, Kable went  
2 to Southhaven High school?  
3 A. Yes, sir.  
4 Q. And now he's at Northwest Community  
5 College?  
6 A. Yes, sir.  
7 Q. And he's going over to Ittawamba  
8 Community College, I believe?  
9 A. In the fall, he'll be transferring to  
10 Ittawamba.  
11 Q. And I know that your son Levi is already  
12 over at Ittawamba?  
13 A. Yes, he is.  
14 Q. In fact, you and I both know something we  
15 have in common, we both love soccer. And we have  
16 kids that play soccer. Levi is a soccer player at  
17 Ittawamba?

18 A. Correct.  
19 Q. And is over there on scholarship?  
20 A. Yeah.  
21 Q. And is Kable, I know he's a well thought  
22 of soccer player as well. Is he going over there to  
23 play soccer?  
24 A. He is.  
25 Q. And all of your children went through the  
1400

1 Memphis football club?  
2 A. At one point -- well Kable didn't. I  
3 don't think the Memphis Football Club was formed at  
4 the time he was playing.  
5 Q. But the Memphis Football Club is a soccer  
6 club that has one of the better -- is one of the  
7 better soccer operations in the South?  
8 A. Yes, sir, it sure is.  
9 Q. And you go all over, I know I've lived  
10 this life from maybe a little -- from Jackson, but  
11 you go all over the South playing soccer?  
12 A. Yes, sir.  
13 Q. And Kable went through what the -- the  
14 soccer programs here in Desoto County?  
15 A. Mostly. He was on a team that was formed  
16 in Desoto County called United, I believe, that was  
17 a premier competitor team.  
18 Q. And does Kable smoke?  
19 A. I've seen him smoke. I think he's smoked  
20 occasionally. It's not something he does all day  
21 everyday.  
22 Q. Was he a -- was he a regular smoker when  
23 he was, you know, 17 or 18-years-of-age?  
24 A. I don't know.  
25 Q. Now, we've talked about Kable and Levi,  
1401

1 as to where they are in life and where they are in  
2 school. And Marcille, the third child, she went  
3 through Southhaven High School, I believe?  
4 A. Correct.  
5 Q. And was letterhead in a number of sports?  
6 A. Mainly soccer.  
7 Q. She ran track?  
8 A. No.  
9 Q. No?  
10 A. She played tennis, and she played  
11 basketball. I think those were in either her  
12 freshman or sophomore years.  
13 Q. But she, too, played for the Memphis  
14 Football Club?  
15 A. Yes, she did.  
16 Q. And, in fact, Marcille is going to Hinds  
17 Community College on a soccer scholarship?  
18 A. Yes, she is.  
19 Q. And Marcille and my daughter have spent  
20 some weeks at the Olympic development camp before in  
21 the past?  
22 A. Yes, she has.  
23 Q. Now, the baby, B. K., B. K. is in, what,  
24 the 9th --  
25 A. She'll be going into her sophomore year,  
1402  
1 10th grade.  
2 Q. That would be the 10th grade, okay. B.

3 K., I think she told me when we deposed her, is the  
4 manager of the high school soccer team?  
5 A. She was this past season.  
6 Q. And does B. K. smoke from time to time?  
7 A. I think she has. I've never seen her.  
8 Q. Now, let me talk to you just a minute,  
9 and this won't take long, about your interaction  
10 with your husband, Joe Nunnally, about his smoking.  
11 You -- you told him that you thought he smoked a  
12 lot, I believe.  
13 A. Yes, sir.  
14 Q. And you asked him not to smoke as much as  
15 he was smoking.  
16 A. Correct.  
17 Q. And you even refused to buy cigarettes  
18 for him, because that was your way of protesting the  
19 fact he smoked?  
20 A. Correct. If he was going to get them, he  
21 was going to have to go get them himself.  
22 Q. Now, we've -- we've talked about Joe  
23 Nunnally and where he worked and that sort of thing.  
24 And just so I have it clear in my mind, and I think  
25 I do, he was the manager of McDonald's for a number  
1403  
1 of years, and then he went to Champion TV Rental and  
2 worked there up until his death?  
3 A. Correct.  
4 Q. And during the -- there was a time period  
5 in his life, was there not, that he was very active  
6 in a local theater group?  
7 A. Yes, he was.  
8 Q. Called the "Sock and Buskin?"  
9 A. Sock and Buskin.  
10 Q. And he on and two of his friends formed  
11 that theater group?  
12 A. Correct.  
13 Q. And Joe Nunnally was a very talented  
14 individual in acting and singing and doing the  
15 things that go with stage performances?  
16 A. Yes, he was.  
17 Q. Now, Mr. Merkel talked to you about your  
18 life and obviously how it changed with the death of  
19 your husband. And I want to make certain that I  
20 understand the chronology of the work and the nature  
21 of the work that you were doing at that time period.  
22 The first job that you had after the death of  
23 Mr. Nunnally was running a horse ranch?  
24 A. Correct.  
25 Q. And Joe had an uncle in Florida that had  
1404  
1 a bunch of these Arabian horses, show horses.  
2 A. Correct.  
3 Q. And he agreed to consolidate all of these  
4 Arabian show horses in one location?  
5 A. Correct.  
6 Q. That was at the farm or acreage that you  
7 and Joe owned?  
8 A. Right.  
9 Q. And he built a barn, and you worked for  
10 him out there, I believe.  
11 A. Yes, I did.  
12 Q. And that was the first job that you had?  
13 A. Yes.

14 Q. Now, there was some talk about continuing  
15 to -- to deal with horses. At some point in time,  
16 did that operation for Dr. Nunnally end?  
17 A. He sold it to me in 1992, I think.  
18 Q. Okay. So in 1992, he sold you the -- the  
19 horse operation?  
20 A. Correct.  
21 Q. And I know that you still have horses  
22 today.  
23 A. Yes, I do.  
24 Q. And they -- but you're not -- you're  
25 not -- they're your personal horses; are they not?

1405

1 A. Right.  
2 Q. So when we're talking about continuing to  
3 feed, and board and deal with horses -- and we all  
4 probably a lot of us know the work that's associated  
5 with that -- this is a personal thing rather than a  
6 job thing?  
7 A. It's ran as a -- a business of sorts.  
8 I've got a stallion out there and several mares.  
9 Right now because of the children being as busy in  
10 soccer, we weren't having an opportunity to take  
11 care of the babies like we needed to. So we ceased  
12 breeding any until all the children are older, and I  
13 can go back to it.  
14 Q. Then outside of this ranch operation or  
15 the farm, whatever we call where we're dealing with  
16 the horses, what was the next job that you had?  
17 A. Working for Bally's.  
18 Q. For Bally's, and how long did that last?  
19 A. I worked from '93 -- let's see, December  
20 of '93 to about February of '95, I believe.  
21 Q. Was that a full-time job?  
22 A. Yes, it was.  
23 Q. And then in '95 when you left Bally's,  
24 what did you do?  
25 A. They had closed their boat. And so most

1406

1 everybody that worked for them went on unemployment  
2 until they reopened the boat, which was quite a bit  
3 longer than what they had suspected it would be.  
4 Q. Yeah.  
5 A. And I worked at a place called Dealers  
6 Automobile Auction just part-time. I think it was  
7 on Thursdays and Wednesdays half the day. And then  
8 I got the job at Southhaven Supply in October, I  
9 think.  
10 Q. And worked there pretty much full-time?  
11 A. Full-time until Bally's opened back up.  
12 Q. As of this day, what are you doing now,  
13 Mrs. Nunnally?  
14 A. I work at Southhaven Supply and at  
15 Bally's. Southhaven Supply, I work full-time.  
16 Q. And at Bally's, do you work only on one  
17 day a week?  
18 A. Two days a week, Wednesdays and Sundays.  
19 Q. Now, upon the -- the death of Joe  
20 Nunnally, there was no autopsy performed, was there?  
21 A. No, sir.  
22 Q. And so the way your -- your life is right  
23 now, you've got B. K., the baby daughter that's  
24 going to be in the 10th grade at Southhaven High

25 School?

1407

1 A. Correct.

2 Q. And Marcille is going to be at Hinds  
3 Community College as a full-time student?

4 A. Correct.

5 Q. And Levi is over at Ittawamba as a  
6 full-time student?

7 A. Correct.

8 Q. And Kable will be a full-time student  
9 at --

10 A. Correct.

11 Q. And all of them -- all are still active  
12 in soccer or sports except for B. K.?

13 A. Correct.

14 Q. What are your hobbies, do you still like  
15 horses?

16 A. Them.

17 Q. Pardon?

18 A. Them.

19 Q. Boy, do I understand that. That's a good  
20 hobby.

21 A. Yes, it is.

22 Q. Anything besides your children?

23 A. Well, I still have the horses. But I  
24 don't spend very much time with them. B. K. enjoys  
25 the horses, and she and I plan to spend more time

1408

1 with the horses now that it will be just she and I  
2 at home most of the time.

3 MR. ULMER: Okay. I have nothing  
4 further, Your Honor. Thank you very much,  
5 Mrs. Nunnally.

6 JUDGE CARLSON: Any redirect?

7 MR. MERKEL: Just one question.

8 REDIRECT EXAMINATION BY MR. MERKEL:

9 Q. Kay, you told Mr. Ulmer that at some  
10 point within a year or two of his illness that Joe  
11 switched from Salem to Doral cigarettes?

12 A. Correct.

13 Q. And you said that you asked him to cut  
14 down on them. Why? What were the reasons for the  
15 switching to Doral, and why were you asking him to  
16 cut down?

17 A. I think at the time he switched, it was  
18 mainly because the cigarette prices had gone up.  
19 And he was cutting back financial wise just to not  
20 be spending so much money on it.

21 MR. MERKEL: Okay. That's all we have,  
22 Your Honor.

23 JUDGE CARLSON: Thank you, Ms. Nunnally.  
24 You can step down and return to counsel table.

25 MR. MERKEL: Your Honor, we would next  
1409

1 call Ben Nunnally.

2 BEN NUNNALLY,  
3 having been first duly sworn, was examined and  
4 testified as follows:

5 DIRECT EXAMINATION BY MR. MERKEL:

6 Q. Good morning, Mr. Nunnally.

7 A. Good morning.

8 Q. Would you identify yourself, please, to  
9 the jury and for the Court?



10 A. I'm Benjamin H. Nunnally.  
11 Q. And what relation were you, Mr. Nunnally,  
12 to Joe Nunnally?  
13 A. I'm the middle son. He was my younger  
14 brother.  
15 Q. And what do you do today, what's your  
16 occupation or whatever, Mr. Nunnally?  
17 A. Disabled vet, wood carver.  
18 Q. And you have been disabled since when?  
19 A. 1990.  
20 Q. And what type of disability did you have,  
21 Mr. Nunnally?  
22 A. A hundred percent PTSD, post-traumatic  
23 stress disorder from Vietnam.  
24 Q. Now, tell me a little bit about your  
25 family. How many other brother and sisters did you  
1410  
1 have?  
2 A. I had Joe the youngest, and Guyton the  
3 oldest, two years apart.  
4 Q. Two apart. And you lived where, the  
5 family, when you were growing up, when y'all were --  
6 well, when you were say from six, eight, 10, 12,  
7 14-years-old?  
8 A. Right on the other side of Bullfrog  
9 Corner and right close to big white house.  
10 Q. Where did you go to school, Mr. Nunnally?  
11 A. Horn Lake Elementary and High School at  
12 that time.  
13 Q. Do you smoke cigarettes, Mr. Nunnally?  
14 A. Yes, sir.  
15 Q. When did you start?  
16 A. 10-years-old.  
17 Q. And did your -- do you know when your  
18 brother began smoking?  
19 A. Same time I did, but he was  
20 eight-years-old.  
21 Q. How did you get the cigarettes,  
22 Mr. Nunnally?  
23 A. Copped them from my mother, went and got  
24 them when she went to bed.  
25 Q. Did you give them to Joe and encourage  
1411  
1 him to smoke?  
2 A. Oh, yes.  
3 Q. Why, Mr. Nunnally, at 10, why would you  
4 have started smoking and gotten Joe to smoking?  
5 A. Well, at 10-years-old, it seemed like the  
6 thing to do. And if I'm going to get in trouble, I  
7 want somebody to get in trouble with me.  
8 Q. Did you know if your parents knew about  
9 it you'd get in trouble?  
10 A. Oh, definitely.  
11 Q. You say it seemed like the thing to do.  
12 Why was that?  
13 A. Well, all the ads tell you to do it,  
14 Marlboro Man, the little Kool penguin. And all kids  
15 want to grow up a little bit faster than what they  
16 should.  
17 Q. Did you continue to smoke after that  
18 time?  
19 A. Been smoking 41 years now.  
20 Q. Did Joe continue to smoke after you and

21 he started together?  
22 A. Yes, he did.  
23 Q. How long did you and Joe remain at home  
24 together, I mean as brothers in the same household,  
25 Mr. Nunnally?  
1412  
1 A. Up until I became 17-years-old.  
2 Q. And what happened to separate the two of  
3 you then?  
4 A. Joined the Marine Corps.  
5 Q. You did?  
6 A. Yes -- yes, sir.  
7 Q. And after you left or where was Joe when  
8 you left? Was he still at home?  
9 A. Still at home.  
10 Q. When you came back from the Marine Corps,  
11 did you return to -- to the area?  
12 A. For a short while.  
13 Q. And then were you away, absent from here,  
14 for a period of time?  
15 A. I reenlisted in the Army to go back to  
16 Vietnam, and I was in the Army for three years.  
17 Q. And that ended when?  
18 A. About 1972 or '73.  
19 Q. And after that hitch was over and you got  
20 out again, did you come back to the area  
21 permanently?  
22 A. Another short while, then I ran off to  
23 Louisiana.  
24 Q. Okay. During these periods when you were  
25 in and out of the service and in here, partly, did  
1413  
1 you see Joe frequently?  
2 A. Not real frequently. I'd go up to  
3 McDonald's and talk to him for a while, and  
4 sometimes on Christmas, Thanksgiving, things like  
5 that.  
6 Q. Joe continued during that period of time  
7 to smoke, when you would see him on the occasions  
8 you were here?  
9 A. Yes, sir.  
10 Q. How would you describe his smoking, the  
11 frequency of it or the amount of it, or any way you  
12 want to characterize it?  
13 A. I know that I was smoking one or two  
14 packs, I guess he was about equal with me. But I  
15 don't really know how much he smoked being as I  
16 wasn't there.  
17 Q. And eventually you came back to this area  
18 and have been here regularly?  
19 A. I've been here since 1989.  
20 Q. Are you aware, Mr. Nunnally, of any  
21 effort that -- have you ever tried to quit smoking,  
22 sir?  
23 A. I've attempted, but I'd always get mad  
24 and restart.  
25 Q. How about Joe? Were you aware of any  
1414  
1 efforts he ever made along those lines?  
2 A. No, sir.  
3 Q. Sir?  
4 A. No, sir.  
5 Q. And you have not been successful, either?

6 A. No, sir, got a pack sitting right here.  
7 MR. MERKEL: Thank you, Mr. Nunnally.  
8 That's all we have, Your Honor.  
9 JUDGE CARLSON: Cross examination,  
10 Mr. David.  
11 MR. DAVID: Your Honor.  
12 CROSS EXAMINATION BY MR. DAVID:  
13 Q. Mr. Nunnally, how are you doing?  
14 A. Tolerable.  
15 Q. You and I met before Court today, and you  
16 and I both have Marine Corps and Vietnam in common,  
17 don't we?  
18 A. Yes, sir.  
19 Q. Mr. Nunnally, you said that you  
20 encouraged Joe Nunnally to start to smoke?  
21 A. Yes, sir, I would get the cigarettes, and  
22 I'd say, "Come on outside, let's smoke a cigarette  
23 out on the porch."  
24 Q. So it's safe to say, then, that it was  
25 you and not any advertising that got Joe Nunnally  
1415

1 smoking?  
2 A. Well, it was advertising that got me  
3 started, and I'm sure it was advertising that kept  
4 him smoking.  
5 Q. Well, aside from advertising that might  
6 have kept him smoking, in terms of getting him  
7 started smoking, though. Didn't you say in a  
8 deposition earlier that no amount of advertising  
9 could make somebody do something that they didn't  
10 want to do?  
11 A. Yes, sir, I probably did. But I probably  
12 wasn't explained the question well enough for --  
13 about the advertising. I would need to think about  
14 it, cause --  
15 Q. Do you know of any specific ads or TV  
16 commercials that Joe Nunnally saw from firsthand  
17 knowledge before he started to smoke?  
18 A. Marlboro Man.  
19 Q. Marlboro, okay.  
20 A. I think the penguin was skiing, for Kool  
21 menthols.  
22 Q. Do you know if your parents knew --  
23 approved of the smoking?  
24 A. I knew if they knew I was smoking.  
25 Q. They would disapprove?

1416  
1 A. They would disapprove because of the  
2 early age.  
3 Q. And because of the possible health  
4 effects of smoking?  
5 A. 1960, they didn't know too much about  
6 possible health affiliations, and I definitely  
7 didn't pay any attention to it.  
8 Q. Now, you indicated that you would -- you  
9 would snatch cigarettes from your parents --  
10 A. Yes, sir.  
11 Q. -- is that correct? And so the only time  
12 that you would smoke at that early age is when you  
13 could snatch cigarettes from your parents?  
14 A. Yes, sir.  
15 Q. And you would not smoke in the house. So  
16 that you would avoid the smell of smoke in the house

17 so your parents wouldn't know you were smoking,  
18 correct?  
19 A. Yeah, I was kind of a smart kid.  
20 Q. You went out on the porch, too, so you  
21 could see whether your parents were coming so you  
22 could put them out, didn't you?  
23 A. Uh-huh.  
24 Q. And at that time when you were -- after  
25 you smoked your first cigarette, you said you got  
1417  
1 "dog sick"; is that right?  
2 A. Oh, yes, that's the most terrible sick  
3 you could get.  
4 Q. And Joe did, too, didn't he?  
5 A. Oh, yes.  
6 Q. So you knew at that point they had the  
7 potential of not being very good for you, didn't  
8 you?  
9 A. I understand, but I went back out and  
10 smoked another one.  
11 Q. You didn't, but Joe didn't, did he?  
12 A. I think he did but I --  
13 Q. But for a time, Joe would only smoke what  
14 you would give him from snitching from your parents;  
15 isn't that right?  
16 A. Yes, sir.  
17 Q. And then after a few weeks, you have no  
18 recollection of the frequency with which Joe smoked  
19 cigarettes; isn't that true?  
20 A. I -- that's -- I'd say that's true.  
21 Q. Okay.  
22 A. We smoked together for at least a month,  
23 maybe a little more.  
24 Q. And after that, I think you went your  
25 separate ways. And you don't really know how much  
1418  
1 Joe smoke or even if he smoked for a number of  
2 years, isn't that true?  
3 A. Well, I think he smoked.  
4 Q. You just don't know?  
5 A. Just not positive.  
6 Q. Right. And then after you -- when you  
7 enlisted in the Marine Corps and Joe was in school,  
8 once you left for the Marine Corps for that two-year  
9 period or so that you were gone, you don't know how  
10 much Joe was smoking, do you?  
11 A. I don't know how much he was smoking. I  
12 know he was smoking because I would come home -- I  
13 came home on leave before I went to Vietnam for 30  
14 days.  
15 Q. Now, you never heard Joe say that he  
16 blamed the tobacco companies for him starting  
17 smoking, did you?  
18 A. No.  
19 Q. And he never blamed the tobacco companies  
20 for him continuing to smoke, either, did he?  
21 A. No.  
22 Q. Okay. And you continued to smoke  
23 regularly from the time you first began; is that  
24 correct?  
25 A. Yes, sir. One time I was at four packs a  
1419  
1 day.

2 Q. Okay.  
3 A. But that was my home away from home.  
4 Keep me awake at night.  
5 Q. It's true, isn't it, Mr. Nunnally, that  
6 when you and Joe were very young boys your  
7 grandmother threatened to have you cut out of her  
8 will, if she knew that you were smoking?  
9 A. Yes, sir.  
10 Q. And she did that because she was  
11 concerned about young boys smoking and the health  
12 risks possibly associated with that?  
13 A. Actually, it was because mother lost  
14 twins. And she quit everything and didn't want  
15 anything -- us doing anything that she considered  
16 bad.  
17 Q. And one of those things was smoking?  
18 A. Yeah.  
19 Q. And didn't -- Joe was an independent  
20 person?  
21 A. Well, more or less grew up to be one.  
22 Q. Okay. When he grew up, he was  
23 independent. He was a hard worker?  
24 A. Definitely.  
25 Q. Strong willed?  
1420  
1 A. Yeah, I would say that he was strong  
2 willed.  
3 Q. He was determined, that when he set a  
4 goal, he reached it?  
5 A. Must have the way he came up through the  
6 store.  
7 Q. That was your impression?  
8 A. Yeah.  
9 MR. DAVID: That's all the questions I  
10 have. Thank you, Mr. Nunnally.  
11 MR. MERKEL: Just a couple.  
12 JUDGE CARLSON: Okay.  
13 REDIRECT EXAMINATION BY MR. MERKEL.  
14 Q. Mr. Nunnally, wait just a second. I have  
15 a couple more.  
16 A. I was just scooting the cushion back.  
17 Q. You mentioned advertising. I'll show you  
18 some exhibits that are in evidence. And ask you if  
19 you would glance through a few of those, please,  
20 and --  
21 A. Oh, yes.  
22 Q. I think the copyright date is on them at  
23 the bottom. I think if you'll look at them, I think  
24 you'll see most of them are in 1964 and 1965, in  
25 that period.  
1421  
1 A. Yes, sir.  
2 Q. Do you reckon -- flip through them a  
3 little bit and see what's in them?  
4 A. That looks real fine, fishing, walk  
5 around out in the woods with a shotgun with a girl,  
6 that looks fairly cool. I can't say much about this  
7 one, passing the fruit. But you're with a young  
8 lady, so that would be kind of cool. Another  
9 fishing. Winston. And a Carnival.  
10 Q. Does it look like through them the people  
11 in them are having fun?  
12 A. A lot more fun than what I have nowadays.

13 Q. Most of the men in them have nice looking  
14 companions?

15 A. Yes, sir.

16 Q. Are those typical, Mr. Nunnally, of the  
17 ads that were being run at the period that you and  
18 Joe were snitching cigarettes and smoking behind  
19 your parents' back?

20 A. Yes, sir. Here's another one where the  
21 man smoking was in a nice green square. They all  
22 look like they're having a fine time.

23 Q. At the time you were this age from 10 to  
24 16 years or so old, as far as your companions, and  
25 your peers, and friends at school and all, was this  
1422

1 looked at as being the thing to do if you wanted to  
2 be in and cool?

3 A. Oh, yes, sir. We had a smoke hole at the  
4 school. And most of the school boys were in the  
5 smoke hole when we got occasion to walk through  
6 there.

7 Q. You mean the school provided a place for  
8 them to go and smoke?

9 A. Yes, sir.

10 Q. Mr. David asked you about health risks,  
11 if you and Joe were aware of the health risks in  
12 1960. And you said there wasn't much information  
13 about it. By 1966 when they began putting the  
14 little warning on the side of the pack, what did  
15 y'all think of that?

16 A. I thought it was a good joke.

17 Q. Why?

18 A. Well, it might have stopped somebody that  
19 was starting then. But if you had started six or  
20 seven years earlier and got hooked, it would -- you  
21 wouldn't pay any attention to it. And you wouldn't  
22 be feeling anything at that point.

23 Q. Well, did that warning make you think,  
24 Mr. Nunnally, that there was a health risk  
25 associated with that?

1423

1 A. Not really.

2 Q. Why?

3 A. That's why I thought it was so funny.

4 MR. DAVID: I want to object, on a  
5 preemption basis.

6 JUDGE CARLSON: On that question, I'll  
7 sustain the objection.

8 Q. (By Mr. Merkel) What did you think about  
9 the information imparted on the warning,  
10 Mr. Nunnally?

11 MR. DAVID: Same objection, Your Honor.

12 MR. MERKEL: Well, Your Honor, he was  
13 asked on direct what they thought about health  
14 risks. That was Mr. David's area of inquiry.

15 MR. DAVID: We didn't ask any questions  
16 on the warning on the pack of cigarettes, Your  
17 Honor. It's preempted.

18 JUDGE CARLSON: Based on cross  
19 examination, I'll sustain the objection.

20 MR. MERKEL: Thank you, Mr. Nunnally.  
21 That's all we have.

22 JUDGE CARLSON: Can Mr. Nunnally remain  
23 under the rule or be released from the rule?

24 MR. MERKEL: He can be released, Your  
25 Honor, and would ask that he be finally discharged.

1424

1 JUDGE CARLSON: Mr. Nunnally, you're  
2 finally released. That means you're free to go. If  
3 you'd like to stay in the courtroom, that would be  
4 fine, too.

5 THE WITNESS: Thank you.

6 MR. MERKEL: Your Honor, the next thing  
7 we would have to be a deposition of a Dr. Rodgman.

8 JUDGE CARLSON: Let me see counsel at the  
9 bench just a moment.

10 (Off-the-record discussion at bench.)

11 JUDGE CARLSON: Ladies and gentlemen, let  
12 me tell you what I'm about to do and hopefully  
13 explain it. In a moment, I'm going to give you an  
14 early lunch break. As I mentioned at the outset,  
15 there's been a lot of work by the way of pretrial  
16 work, way before we got -- last Friday when first  
17 started working.

18 Well before that time, months prior to  
19 that time, there's been a lot of work to try to move  
20 along, so when we did get the jury in the box it  
21 would be hopefully very little delay, knowing how  
22 things go during the course of a trial, any trial,  
23 there might be some time to work without the jury.  
24 We're at that point now that, again, there was a lot  
25 of work up until this point.

1425

1 But there were a couple of matters that  
2 had to be dealt with that we knew really could not  
3 be dealt with until we got that to that point if  
4 that makes sense based on the status of the record,  
5 and everything that had happened up until that  
6 point, there was no way I could make some decisions  
7 until we got to the point of these next two  
8 witnesses to be called.

9 So I need a little time to work with the  
10 lawyers. I don't believe it will be a long period  
11 of time, an hour to an hour-and-a-half. So in a  
12 moment, I'll give you a lunch break until 1:30. But  
13 again, to kind of let you know where we are, I know  
14 again referring to the gentleman who made the  
15 comment out in the jury panel observing that it had  
16 taken longer to get a jury than everybody thought.  
17 Therefore the trial time would be pushed back, or  
18 the ending time or ending date would be pushed back  
19 some.

20 But really, from talking with the lawyers  
21 this morning before we got started, we're probably  
22 at least back on schedule if not ahead of schedule  
23 to the extent that with an outside possibility still  
24 being that we could conclude or get the case to you  
25 for deliberation by the end of next week,

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1 recognizing the 4th of July holiday. We possibly  
2 could get it by the end of next week for  
3 deliberations or possibly even the first part of the  
4 following week. But again still being at least back  
5 on schedule if not ahead of schedule as we initially  
6 anticipated trial time being eight to 10 days.

7 So I wanted to let you know in case you  
8 were wondering, so far behind schedule, could go way

9 behind what was anticipated. At this point, that  
10 does not appear to be the case. We appear to be on  
11 schedule, if not ahead of schedule. So with that in  
12 mind, I'll give you a lunch break until 1:30. When  
13 you come back from lunch, hopefully we'll be ready  
14 to go forward, and we'll work up until a logical  
15 time to recess for the day. And as you know from  
16 what we talked about earlier, once we recess today,  
17 then we'll be in recess until Wednesday, July the  
18 5th. So that all of you hopefully can have a good  
19 4th of July weekend and holiday. I'll put you in  
20 recess until 1:30. I do need to ask you again  
21 please keep in mind about not discussing the case.  
22 Thank you.

23 (Jury exits courtroom.)

24 JUDGE CARLSON: Let's take just a short  
25 break, maybe about a five minute break, and then

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1 we'll get started.

2 (A short break was taken.)

3 JUDGE CARLSON: All right. Gentlemen,  
4 let's go ahead and try to move through this as  
5 quickly as we can so we can move on and get ready  
6 for the jury. Let me get some feel. I know that  
7 basically what we're talking about as far as the two  
8 witnesses, some feel as to what the objections are  
9 that we have to deal with. And I understand there  
10 might be some documents that we have to deal with.  
11 What's the problem? What do we need to deal with?

12 MR. MERKEL: Your Honor, what we have  
13 done with both of these depositions, they were  
14 depositions taken in the Minnesota litigation, is  
15 that where they came from? And they were given to  
16 us. And when we were asking to try and take the  
17 deposition of these people, it was simply suggested  
18 that their testimony had been taken ad nauseam up  
19 there.

20 And so we were furnished copies of -- of  
21 the depositions, and rather than taking them again,  
22 that's what we got, so they're not related to this  
23 factual situation directly. But they're -- both of  
24 the gentlemen are scientists that worked for R. J.  
25 Reynolds in the '50s, '60s, '70s -- I'm not sure how

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1 far.

2 MR. ALDEN: I think they both started in  
3 about 1953 or '54, and Dr. Rodgman retired in the  
4 late '80s, and Dr. Teague retired in the mid-'80s.

5 MR. MERKEL: Sometime late '70s or  
6 something.

7 MR. ALDEN: I would say the mid-'80s, but  
8 they've both been retired about 15 years. They were  
9 retired at the time of these depositions.

10 MR. MERKEL: Anyway, Your Honor, both of  
11 their depositions in their entirety was 500 pages or  
12 thereabouts long. We've gone through and cut and  
13 pasted and tried to come up with something that's  
14 about a hundred page deal on it. And there are  
15 introductory passages to say who they are and try to  
16 make them make some sense to the jury in context of  
17 who they were. What they were doing, what they  
18 reported to, that type thing.

19 And then the bulk of the depositions or



20 the portions that we've highlighted and intend to  
21 use deal with five, six documents, I guess, three  
22 apiece or something. That are -- were authored by  
23 these gentlemen. In other words, they were papers  
24 that they created while working for Reynolds. And  
25 the lawyer in the Minnesota action was questioning  
1429

1 them about those documents. Reading portions, and  
2 asking them what they meant, and where that came  
3 from and why they felt that way. That's kind of the  
4 nature of it. So just overview, that's what is in  
5 them, and I'll leave you to tell him what the  
6 objections are.

7 MR. ALDEN: In terms of the way I would  
8 suggest that we proceed, I've put them in notebooks.  
9 Why don't we just start. In terms of overview, he's  
10 right. We've lodged a lot of objections, but I  
11 think if we start at tab the 1, we can get rid of  
12 about 10 tabs fairly quickly. Most of our  
13 objections are relevance as to these documents. One  
14 of them I think he dealt with yesterday. It was the  
15 document by Dr. Teague that we had the argument  
16 about a couple of others are drafts. So we're going  
17 to object to the argument on that basis, but  
18 basically our objections are relevance, and I think  
19 if we just go through the tabs, it might sound like  
20 an impossible process, but I don't think it is.

21 JUDGE CARLSON: You want to take --

22 MR. ALDEN: I think he wanted to start  
23 with Dr. Rodgman,

24 JUDGE CARLSON: Okay. Rodgman,  
25 R-O-D-G-M-A-M, like Roger, Rodgman.

1430

1 MR. ALDEN: Correct.

2 JUDGE CARLSON: Okay.

3 MR. ALDEN: The first designation, and  
4 Mr. Merkel told me this morning -- well, to give you  
5 the history, they designated one set of designations  
6 a month ago. They cut that on Sunday. They cut it  
7 again -- or they cut it twice on Tuesday. And he's  
8 told me that last night they cut it some more. We  
9 haven't seen that list. So maybe some that come up  
10 have already been withdrawn by the Plaintiff.

11 The first one I have is page 13, line  
12 five.

13 MR. MERKEL: Your Honor, we have cut that  
14 again, so that's gone.

15 JUDGE CARLSON: Let me first of all, I  
16 have looked at this earlier when it was tendered  
17 earlier in the week, make sure about how all of this  
18 is formatted. Okay. You're looking at tab 1.

19 MR. ALDEN: Correct.

20 JUDGE CARLSON: Not A, just 1, okay. So  
21 the first one designated, page 13, line 5 to page  
22 14, line 6.

23 MR. MERKEL: We've stricken that entire  
24 thing, Your Honor, so tab 1, no problem.

25 JUDGE CARLSON: Okay.

1431

1 MR. ALDEN: Tab 2 is page 14, line 15  
2 again.

3 MR. MERKEL: That's also gone entirely,  
4 tab 2.

5 MR. ALDEN: Tab 3 is page 16, line 2.  
6 MR. MERKEL: That's gone also.  
7 MR. ALDEN: I told you this might be  
8 efficient, Your Honor. At this rate, we'll do well.  
9 The next one are a collection of three behind a  
10 single tab. The first of that collection is page  
11 18, line 10.

12 MR. MERKEL: That's gone, the first  
13 designation. The page 20 is gone, and page 20 --  
14 all of that tab is also gone.

15 MR. ALDEN: Okay. The next one is tab 5.  
16 It begins at page 25, line 24.

17 MR. MERKEL: Also gone.

18 MR. ALDEN: Next one is -- behind tab 6  
19 are two, first is at page 27, line 4.

20 MR. MERKEL: That's gone.

21 MR. ALDEN: The next is at page 29, line  
22 22.

23 MR. MERKEL: And that's gone.

24 MR. ALDEN: The next one is a more  
25 substantial designation from 34 to 48.

1432

1 MR. MERKEL: All right. Page 34 is  
2 gone -- well, wait a minute. 34 is out, 35, 36, 37,  
3 38, 39, 40. Okay, that entire thing is gone. Well,  
4 the first line of it, page 34 through page 41. Now,  
5 let me look at the next one. Okay. The next one we  
6 still have in.

7 JUDGE CARLSON: Page 42 line 14 through  
8 page 47, line 25.

9 MR. MERKEL: Yes, sir, 42, 43, 44, 45,  
10 all of that is still in.

11 MR. ALDEN: We start -- I'm sorry, where  
12 are we starting?

13 JUDGE CARLSON: Page 42, line 14.

14 MR. ALDEN: I don't think we object to  
15 that through page 47?

16 JUDGE CARLSON: Right, through page 47,  
17 line 25, according to the amended designation.

18 MR. ALDEN: We don't have an objection to  
19 that one.

20 MR. MERKEL: Do not have an objection to  
21 that, you say?

22 MR. ALDEN: No. The next tab is tab 8.  
23 The first part of it is page 48, line 17.

24 JUDGE CARLSON: Page 48, line 17 to page  
25 56, line 3.

1433

1 MR. MERKEL: That is still in, Your  
2 Honor, other than some banter between counsel and  
3 that kind of thing that we struck. But the  
4 substance of it, is still in.

5 JUDGE CARLSON: Okay.

6 MR. MERKEL: And then page 56. Okay.  
7 All of that is still in, everything on tab 8.

8 JUDGE CARLSON: Okay.

9 MR. ALDEN: We object to the beginning  
10 part of the first one of 48. Because he's talking  
11 about work he did for Reynolds' attorneys as a  
12 scientific consultant assisting in that litigation.  
13 That's what he's describing up through page 50, line  
14 8. We don't think that's the relevant. We think it  
15 invades our privilege.

16 JUDGE CARLSON: Where he's talking about  
17 what Dr. Rodgman was doing?  
18 MR. ALDEN: As a scientific consultant or  
19 paralegal for the attorney.

20 MR. MERKEL: Of course, a lot of the  
21 stuff that we have stricken earlier, Your Honor,  
22 is -- obviously gives a lot of the banter and  
23 background between who he was working for and who  
24 was paying him and that sort of stuff. And you  
25 know, we can go back and look at it for the Court's

1434

1 benefit in doing this. But basically as I  
2 understand the testimony on these pages and what  
3 went before it, there was a law firm that was  
4 involved in I guess defense of tobacco litigation.  
5 That at times would request synopses and summaries  
6 of stuff.

7 And he would simply pull together things  
8 that were in Reynolds' library, or Reynolds' lab  
9 records and make some kind of thing like that. But  
10 it was not clear in the earlier part what he was  
11 doing any of this for. It's sort of back and forth.  
12 He was on Reynolds' payroll. He says, himself, he  
13 doesn't know how to characterize who he works for or  
14 who he was being paid by. Doesn't know whether he  
15 was going to be paid. That's a lot of the stuff  
16 that we've taken out.

17 MR. ALDEN: Your Honor, I think that was  
18 talking about who was going to pay him for his time  
19 after he was retired at the time of his deposition.  
20 It's always clear during the '50s at this time we're  
21 talking about that he was a Reynolds' employee, one  
22 of his functions as an employee was to be a  
23 scientific paralegal consultant for the company's  
24 lawyers. And that's what he's talking about through  
25 beginning at page 50. And then he goes into more of

1435

1 his general background starting at page 50, line 9.

2 JUDGE CARLSON: Let me -- make sure I'm  
3 clear on number 1, exactly out of this entire  
4 designation, page 48, line 17 to page 56, line 3, I  
5 understand there's not an objection to portions of  
6 that?

7 MR. ALDEN: Correct.

8 JUDGE CARLSON: Let me make sure so I can  
9 mark it what does the Defendant not object to.

10 MR. ALDEN: Page 53 line 9 through page  
11 53 line 20.

12 JUDGE CARLSON: Page 53, line 20.

13 MR. ALDEN: And then page 54, line 21  
14 through page 55, line 2, or is that the next  
15 designation? Is that within this yeah, it is.

16 JUDGE CARLSON: No objection to that  
17 part?

18 MR. ALDEN: Correct.

19 MR. MERKEL: Pickup again from line 9 on  
20 page 50 through what?

21 MR. ALDEN: Page 53, line 20.

22 JUDGE CARLSON: Okay. Then line 21, page  
23 54 to line 2 of page 55.

24 MR. ALDEN: Correct.

25 JUDGE CARLSON: Okay.

1436

1 MR. MERKEL: Give me just a moment, Your  
2 Honor, please, to look at what's in and what's out.  
3 And maybe we can agree and not waste a lot of time  
4 on it. I'm sorry, give me again on page 48 what you  
5 object to and --

6 MR. ALDEN: From 48 through page 50, line  
7 8, we object. After that on page 50 starting at  
8 line 9, we don't object.

9 JUDGE CARLSON: Let's focus in, first of  
10 all, on what we would need to deal with. It looks  
11 like page 48, line 17 down to line 8 page 50; is  
12 that correct, what we need to deal with.

13 MR. MERKEL: All right, Your Honor, maybe  
14 this might -- if this cures what the problem -- I  
15 would say that lines -- on page 48, lines 17 through  
16 21, obviously, we -- that's lawyer stuff and have no  
17 problem with that. The question at line 22 refers  
18 to what he was doing in the laboratory, and what  
19 types of work he was doing. And that would seem to  
20 me to be -- has nothing to do with lawyers.

21 We were looking at ways to control the  
22 composition of smoke. And then that flows right on  
23 down to -- well, wait, there's another reference to  
24 lawyers in line 9, which we would strike, on through  
25 line -- well, through the end of that page, from  
1437

1 line 9 on page 49 to the end. Okay. Then -- okay.  
2 All the way down to line 9 on page 50. But I think  
3 the first -- that one little answer as to what types  
4 of work he was doing in 1954 and 5 would be in.

5 MR. ALDEN: That's fine, Your Honor.

6 JUDGE CARLSON: We're just talking about  
7 now wanting to stay in evidently from line 22 on  
8 page 48 down through line 8 of page 49; is that  
9 right?

10 MR. MERKEL: Yes, sir.

11 JUDGE CARLSON: Okay.

12 MR. MERKEL: And then we come on down  
13 through, we have got more lawyer stuff in here, line  
14 29 at 53? Okay. That can come out, Your Honor,  
15 from line 21 on page 53, through all of page 54 and  
16 the first two lines of 55. Is that correct?

17 MR. ALDEN: Yes. And on 55, he continues  
18 with his work for the lawyers.

19 MR. MERKEL: 55 the total page, right,  
20 yeah, and the first two lines of 56.

21 MR. ALDEN: Okay.

22 MR. MERKEL: Then where do we go from  
23 there?

24 MR. ALDEN: 56, line 18. Here he's  
25 talking about other company research that basically  
1438

1 Dr. Rodgman didn't know much. We don't think it's  
2 relevant. That's our only objection. That would  
3 continue through 58, line 23. After that, we don't  
4 object.

5 MR. MERKEL: On line what on 58?

6 MR. ALDEN: We object through line 23.  
7 We don't object from 58, line 24 up until page 64,  
8 line 4.

9 MR. MERKEL: Okay. The only part of  
10 that, Your Honor, that -- that I think is -- is  
11 important and will become so on later places in this

12 are questions that begin on line 18 of page 56 and  
13 go through line 11 on page 57. Where the witness  
14 identifies who the Council for Tobacco Research and  
15 so forth are -- well, let's see if he does. Not  
16 worth worrying about. Take it all out.

17 JUDGE CARLSON: Line 18, page 56 down  
18 through line 11 of page 57; is that right?

19 MR. MERKEL: Yes, sir.

20 MR. ALDEN: Well, I think it would go  
21 through the whole designation of 57, wouldn't it?

22 MR. MERKEL: All of 57, isn't it?

23 JUDGE CARLSON: All of 57.

24 MR. ALDEN: And I think the same  
25 reasoning, the next designation picks up at page 58,  
1439

1 line 5. And I -- our objections only start -- I  
2 mean, stop at line 24 of 58. So we object to lines  
3 5 through 23 of page 58 on the same basis.

4 MR. MERKEL: That's fine, Your Honor.

5 JUDGE CARLSON: Okay. So from line 3 of  
6 page 58 down through line 23 of page 58?

7 MR. MERKEL: Yes, sir. And then where do  
8 you go from there?

9 MR. ALDEN: I withdraw our objection on  
10 page 64. That ends this deposition.

11 MR. MERKEL: So we've got in then line 24  
12 on page 58 to where?

13 MR. ALDEN: The end of designation.

14 JUDGE CARLSON: Line 18, page 64?

15 MR. ALDEN: Correct.

16 MR. MERKEL: That gets that tab.

17 JUDGE CARLSON: Next one at tab 9.

18 MR. ALDEN: Tab 9, the first part of it  
19 is page 64, line 25.

20 MR. MERKEL: Okay. We're out -- that's  
21 out.

22 MR. ALDEN: The next is page -- I can't  
23 read the page number.

24 MR. MERKEL: Well, wait, now. 64, line?

25 MR. ALDEN: 25 through page 66, line 16.

1440

1 MR. MERKEL: That's out. That's fine.

2 MR. ALDEN: The next one is 67, line 23  
3 through 69, line 1.

4 MR. MERKEL: And that's out.

5 MR. ALDEN: Next one is page 69, line 5  
6 through 69, line 12.

7 MR. MERKEL: That's out.

8 JUDGE CARLSON: So everything on that  
9 designation on tab 9 is out?

10 MR. ALDEN: Right.

11 JUDGE CARLSON: Okay. Tab 10.

12 MR. MERKEL: Tab 10 -- wait a minute.

13 Okay. Wait a minute, the first part of tab 10, Your  
14 Honor, we have stricken from page 69, beginning line  
15 23 through line 8 on page 71.

16 JUDGE CARLSON: Line what on 69, line 23?

17 MR. MERKEL: Yes, sir, line 23 on page 69  
18 down through and including line 8 on 71.

19 MR. ALDEN: We don't object to the rest  
20 of the designation on 71 and 2, we don't object.

21 JUDGE CARLSON: Okay.

22 MR. ALDEN: This is the big one.

23 JUDGE CARLSON: I'm going to let y'all  
24 study that one.  
25 MR. ALDEN: The next one is tab 11.  
1441  
1 JUDGE CARLSON: Right. Tab 11 is, I see  
2 a good many designations, so I'll give y'all a  
3 chance to study it.  
4 MR. ALDEN: Is the one beginning on page  
5 81, line 1 through 83, line 18 still in?  
6 MR. MERKEL: Yes.  
7 JUDGE CARLSON: Let's try to go through  
8 and see what might be in or out. And then go back  
9 and deal with any objections.  
10 MR. ALDEN: Okay. The next one is page  
11 83, line 21, through page 85, line 23.  
12 MR. MERKEL: That's still in.  
13 MR. ALDEN: Page 86, line 3 through page  
14 9, line 5.  
15 MR. MERKEL: And that's still in.  
16 MR. ALDEN: Page 90, line 2 through page  
17 93, line 16.  
18 MR. MERKEL: Correct, still in.  
19 MR. ALDEN: Page 92, line 23 through 93,  
20 line 17.  
21 MR. MERKEL: Still in.  
22 MR. ALDEN: 94, 3 through 16.  
23 MR. MERKEL: Still in.  
24 MR. ALDEN: 94, 22 through 95 line 14.  
25 MR. MERKEL: Still in.  
1442  
1 MR. ALDEN: Are we in a big string where  
2 we're going to keep them in? I feel that we are.  
3 MR. MERKEL: Do what?  
4 MR. ALDEN: Your Honor, from my general  
5 knowledge of this subject area, I think that  
6 Mr. Merkel hasn't withdrawn any of the next few, we  
7 might as well just start on them But I will continue  
8 to go through them if you want.  
9 MR. MERKEL: Let me see, the next --  
10 JUDGE CARLSON: Maybe I'll let Mr. Merkel  
11 just look going down your designations on tab 11,  
12 just study for a minute and see if there's any that  
13 might come out.  
14 MR. ALDEN: Anything through page 150.  
15 MR. MERKEL: All right. We have taken  
16 out from line 24, page 95, line 24 through 16, on  
17 line 16 on page 96, we have taken that out.  
18 MR. ALDEN: Okay.  
19 MR. MERKEL: And we have taken out on  
20 page 97, every part of 97. And the rest of it  
21 through page -- all right. We've taken out some on  
22 page 112, line 23 through line 18 on 114, we've  
23 taken that out. And on page 133, we took out that  
24 little segment there from line 7 to 11. And on 135,  
25 we took out the part beginning on 135 and ending on  
1443  
1 136 on down through line 23 on 136.  
2 JUDGE CARLSON: Let me see. 135, all of  
3 135.  
4 MR. MERKEL: And down through line 23 on  
5 136. And then every -- that's all that we've taken  
6 out. Everything else is still in under this tab 11.  
7 JUDGE CARLSON: Let's go back to the

8 beginning, page 91, line 18.  
9 MR. MERKEL: That is still in.  
10 JUDGE CARLSON: Let's deal with what the  
11 objection is on that.  
12 MR. ALDEN: We don't object to 83. 80 --  
13 through line 18 of 83.  
14 JUDGE CARLSON: Right.  
15 MR. ALDEN: At line 19 of 83 -- well, I  
16 guess that's not in.  
17 JUDGE CARLSON: According to this, the  
18 next will be line 21 at page 83 through line 23 of  
19 page 85.  
20 MR. ALDEN: That's the middle of a  
21 question. We don't object up through 85.  
22 MR. MERKEL: Through 85, line 23 is okay?  
23 MR. ALDEN: Right.  
24 MR. MERKEL: Okay.  
25 MR. ALDEN: On page 86, we get to a

1444

1 document. The document is clearly a document that  
2 never got finalized. And what he's essentially  
3 doing for several pages thereafter is reading from a  
4 draft document is tab -- it's Plaintiff's Exhibit  
5 678. Is that one I gave Your Honor? I think it is.  
6 JUDGE CARLSON: I'm looking. The  
7 reference you mean on page 86 with reference to  
8 Exhibit 1049?  
9 MR. ALDEN: The problem is that's a  
10 Minnesota Exhibit Number. I'm sorry. I've tried to  
11 cross reference where I could.  
12 MR. MERKEL: Our Exhibit Number is 678,  
13 correct?  
14 MR. ALDEN: Correct.  
15 MR. MERKEL: And if we read it, I guess  
16 we would substitute the 1049 for 678 to make sense.  
17 MR. ALDEN: That would make some sense.  
18 He's testifying about a document we think that's not  
19 a business record. It's clearly a draft, clearly  
20 was -- this is not a final copy.  
21 JUDGE CARLSON: Your objection is the  
22 fact it's a draft of a document, not the final  
23 document?  
24 MR. ALDEN: Right, so it's not a business  
25 record. It also is irrelevant on the what we knew

1445

1 when we knew it theory.  
2 MR. MERKEL: Your Honor, I think the  
3 contents of page 86 was a document written by him  
4 written in the ordinary course of business. It was  
5 maintained in the ordinary course of business. And  
6 is one of the works or part of the work that  
7 Mr. Ulmer raised in opening statement yesterday  
8 about identification of composition of tobacco smoke  
9 and so forth. So this is -- whether it was the  
10 draft or the final or whatever it is, it doesn't  
11 make any difference. It was Mr. Teague's -- I mean  
12 Dr. Rodgman's work product. It was going on there  
13 in the laboratory. It had nothing to do with  
14 lawyers. It was his chemical analysis and work on  
15 the smoke.  
16 MR. ALDEN: Your Honor, I apologize. I  
17 misrepresented something without meaning to. He is  
18 not talking about the draft here. There is -- we

19 withdraw our objection based on the draft. It is,  
20 in fact, number 679, not number 678. I apologize.  
21 Plaintiff's designated both the draft and the final.  
22 Our sole objection would now be on relevance, what  
23 we knew when we knew it.

24 MR. MERKEL: But the document is 670 --  
25 MR. ALDEN: 9.

1446

1 MR. MERKEL: Let me change this to make  
2 it make sense.

3 JUDGE CARLSON: Then based on -- as I  
4 understand, the sole objection remaining, having  
5 read through these portions of the deposition, I'll  
6 overrule the objection and permit it to be read.

7 MR. ALDEN: Our next -- our next  
8 objection would be at page 88. We're beginning at  
9 line 5. They start talking about what is, in  
10 essence, a warning claim.

11 JUDGE CARLSON: Page 88, line 5?

12 MR. ALDEN: Yeah. "Did Reynolds take out  
13 an ad in 1959 that told smokers," et cetera, et  
14 cetera. That's relevant only to a warnings claim.  
15 There's no warnings claim here: Further down they  
16 reference "Frank Statement" on line 20.

17 MR. MERKEL: We're beginning -- let's  
18 see.

19 MR. ALDEN: Page 88, line 5.

20 MR. MERKEL: Okay. I've got you.

21 MR. ALDEN: Through the end of that  
22 designation, page 88, line 5. We object because  
23 it's only relevant in a warnings claim.

24 MR. MERKEL: Okay. We'll take that out,  
25 Your Honor. We've taken the other out below it. So

1447

1 it doesn't make sense anyway, never answered. We'll  
2 take out through the end of line 5 on 89.

3 MR. ALDEN: Okay.

4 JUDGE CARLSON: So line 5, page 88  
5 through line 5 on page 89?

6 MR. MERKEL: Yes, sir, that's out. I'll  
7 delete it.

8 JUDGE CARLSON: Page 90, line 2, to page  
9 92, line 16.

10 MR. MERKEL: Yes, sir, and that's -- we  
11 think it should still be in.

12 MR. ALDEN: And other than our objection  
13 to the document, which has already been overruled,  
14 we have no objection to the designation that  
15 beginnings at page 90, the one that begins at 92.

16 JUDGE CARLSON: Objection will be noted.  
17 The document will be admitted, and it will stay in.

18 MR. ALDEN: Can I just have a continuing  
19 objection once you've overruled my objection to a  
20 document.

21 JUDGE CARLSON: Yes, sir. Let the record  
22 so reflect.

23 MR. MERKEL: So the rest of the tab 11,  
24 then?

25 MR. ALDEN: No. Page 94, no objection to

1448

1 lines 3 through 16. Page -- at the bottom of page  
2 94, he's quoting from and asking him about a  
3 sentence from the "Frank Statement." So we would



4 object to the designation at the bottom of 94  
5 beginning on page -- line the 22 of 94 through line  
6 14 of 95.

7 MR. MERKEL: On that, Your Honor, we have  
8 stricken the references to the "Frank Statement."  
9 In other words, lines 17 through 23 -- no, 22, we  
10 simply start out with a question "Based on the fact  
11 that by 1955, '59, you had now found the presence of  
12 numerous hydrocarbons," and this came from the part  
13 of that, "and you could no longer say the product is  
14 not injurious to health." We have taken out any  
15 reference to the "Frank Statement" which this the  
16 lawyer was trying to juxtaposition the thing to.  
17 And now it's just a straight question without  
18 reference to anything.

19 MR. ALDEN: Your Honor, although it  
20 doesn't reference the "Frank Statement" by its name.  
21 It does include the statement from the "Frank  
22 Statement" that cigarettes are not injurious to  
23 health, which is a statement made in '54, in the  
24 "Frank Statement." That in this lawsuit I would  
25 submit irrelevant and would follow from the

1449  
1 exclusion of the "Frank Statement", itself. The  
2 very end of the question quotes the "Frank  
3 Statement," although it's not in quotes.

4 MR. MERKEL: Of course, Your Honor, the  
5 testimony is already in that Reynolds has maintained  
6 consistently the position that it was not  
7 cancer-causing and so forth. And that's what this  
8 goes to. There's no reason to reference it to the  
9 "Frank Statement" at all.

10 MR. ALDEN: Your Honor, that isn't, I  
11 don't think what the testimony is. I think if you  
12 listened to Dr. Burns, and I'm sure you did.  
13 Dr. Burns said Reynolds' position was it had not  
14 been scientifically established that smoking caused  
15 the disease. This says, and this is what the "Frank  
16 Statement" said that products were not injurious.  
17 There's a very big difference and a very  
18 substantive difference between saying it's not  
19 injurious and saying there's insufficient scientific  
20 evidence to establish causation. I don't think  
21 there's any evidence in the record in this case that  
22 Reynolds has taken the position in the "Frank  
23 Statement."

24 MR. MERKEL: We can move through some of  
25 that, Your Honor. I will strike from line 22 and

1450  
1 get rid of the reference to the "Frank Statement"  
2 completely down to line 7 on page 95.

3 MR. ALDEN: Well, that question, again,  
4 -- okay. That's okay with us.

5 JUDGE CARLSON: All right.

6 MR. ALDEN: Your Honor, for the sake of  
7 completeness, we'd ask that something that  
8 Mr. Merkel has stricken be included, just the next  
9 answer down through 96, line 5, because right now,  
10 the designation ends, "That's your testimony? Yes,  
11 that's my testimony, and may I add something to  
12 that?" And then he does add something to that, but  
13 the Plaintiffs have stricken that. So we'd ask for  
14 completeness that that come in.

15 MR. MERKEL: That's fine, Your Honor.  
16 JUDGE CARLSON: All right.  
17 MR. MERKEL: How much more of this?  
18 MR. ALDEN: Just through line 6 -- line  
19 5.  
20 MR. MERKEL: You want to just start where  
21 he says, "May I add" and then pick up down there at  
22 page 96?  
23 MR. ALDEN: But then stop at line 6 of  
24 96.  
25 MR. MERKEL: You don't want the "Frank  
1451  
1 Statement?"  
2 MR. ALDEN: No, I don't want to put that  
3 in.  
4 JUDGE CARLSON: Starting with line 13 on  
5 page 95 on or continuing on --  
6 MR. MERKEL: Just continuing on all the  
7 way down to line 5 -- through line 5 on 96, without  
8 the lawyer jiberis, is that --  
9 MR. ALDEN: I assume we have an  
10 understanding that I don't have to object to  
11 lawyer's objections being read in here.  
12 MR. MERKEL: Absolutely.  
13 JUDGE CARLSON: Down through line 5 on  
14 page 96.  
15 MR. MERKEL: Now we're back to you're  
16 saying the general objection has been overruled?  
17 MR. ALDEN: Well, the problem is on 98.  
18 He's answering a "Frank Statement" question. If you  
19 begin it -- it's kind of hard to -- I think R. J. --  
20 we would object to.  
21 JUDGE CARLSON: We're talking about page  
22 98 now?  
23 MR. ALDEN: Yeah, 98, he's responding  
24 with a "Frank Statement" picks up with an answer on  
25 98. And the answer is to a question that is both a  
1452  
1 warnings and a "Frank Statement" question. So I  
2 guess we would object to that.  
3 JUDGE CARLSON: Going down through,  
4 according to this, what, line 4, page 99?  
5 MR. ALDEN: Actually, not that much.  
6 If -- frankly, if you start on line 6 of 98 and  
7 stick carcinogens in the word, that question, you  
8 could go on from there. That might be doctoring the  
9 testimony but --  
10 MR. MERKEL: Striking out just two lines,  
11 4 and 5 on page 98?  
12 MR. ALDEN: right, and you need the  
13 define --  
14 MR. MERKEL: What?  
15 MR. ALDEN: Then you're asking a question  
16 that references "them," and I think you need to say  
17 "them" is carcinogens.  
18 MR. MERKEL: Instead of "them" say,  
19 "carcinogens"?  
20 MR. ALDEN: Yeah.  
21 MR. MERKEL: That will work. Now, does  
22 that flow us through that tab?  
23 MR. ALDEN: Yes. No objection through --  
24 oh, we object to the relevance on the when we knew  
25 and what we knew.

1453

1 MR. MERKEL: Same objection we had a  
2 minute ago on the rest of that tab?

3 MR. ALDEN: Well, it's now getting into a  
4 new document. I think I need to make a new  
5 objection. On page 99, line 21, we don't think it's  
6 relevant in light of the Court's ruling pretrial on  
7 what we knew and when we knew it.

8 JUDGE CARLSON: Down to line 21, page 99?

9 MR. ALDEN: Right.

10 JUDGE CARLSON: Down to page 103, that  
11 entire designation?

12 MR. ALDEN: Yeah, and we'll be getting to  
13 a document at the end of it. It's the one that's  
14 been labeled Newcombe 141 or Nunnally 683.

15 MR. MERKEL: The document referenced at  
16 the bottom of page 102 is now 683?

17 MR. ALDEN: I think so.

18 JUDGE CARLSON: Any response, Mr. Merkel?

19 MR. MERKEL: Yes, Your Honor. Again,  
20 these are simply laboratory tests that they were  
21 conducting on carcinogens and mice. Talking about  
22 the mouse painting studies and determining on -- by  
23 1962 the cigarette smoke, lung cancer problems, it  
24 had been investigated in all of these manners and so  
25 forth. Again, it's just showing the state of the

1454

1 knowledge they had of all of these properties during  
2 this particular period through Dr. Rodgman.

3 MR. ALDEN: And in addition to the  
4 relevance as to the document, the document is  
5 clearly a draft. We don't believe it was ever  
6 finalized. So in that sense, it is not a business  
7 record.

8 JUDGE CARLSON: Based on the status of  
9 the record, I'll overrule the objection, and it will  
10 be permitted.

11 MR. ALDEN: I think that would take us  
12 through 106. It would also deal with 110 through  
13 112.

14 JUDGE CARLSON: Okay, what are you on  
15 now, Mr. Alden?

16 JUDGE CARLSON: I think I'm up to page  
17 115, line 12. Here he's talking about a public  
18 statement relating to smoking and health. We think  
19 that would come within the Court's pretrial ruling  
20 that Reynolds' public statements about smoking and  
21 health that Joe Nunnally didn't see, hear or rely on  
22 such as this one should be excluded. That would  
23 cover include, I think, 116, line 5. Then it would  
24 pick up again with Dr. Rodgman's --

25 MR. MERKEL: In other words, you're just

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1 striking from --

2 MR. ALDEN: Line 112, on 115 through line  
3 5 on 116.

4 MR. MERKEL: That's fine, Your Honor, no  
5 problem. It still is in context below, I think.  
6 How about changing the word "this" to "aid" on line  
7 6?

8 MR. ALDEN: That's fine.

9 JUDGE CARLSON: Where does that take us  
10 to, then?

11 MR. ALDEN: Our next objection would be  
12 on page 119, line 17. We're back to the "Frank  
13 Statement."  
14 JUDGE CARLSON: The --  
15 MR. MERKEL: The middle of line 17 on  
16 119?  
17 MR. ALDEN: Right. And I think he's  
18 asking doctor -- and it goes on, than he starts  
19 asking Dr. Rodgman what it would be reasonable for a  
20 smoker to conclude, which we think is speculation.  
21 It's also argumentative. And that continues  
22 through -- he talks about the "Frank Statement"  
23 again on 121. That's number 54. So I guess we  
24 would object to kind of the whole string that begins  
25 on 119, line 17.

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1 MR. MERKEL: Your Honor, I'm looking at  
2 119. What they're asking him is based on what's  
3 been proven and so forth, wouldn't it be reasonable  
4 for a smoker to conclude the same thing. He says,  
5 "I don't know what a smoker would conclude." I  
6 would conceive we ought to strike out advertisements  
7 and the "Frank Statement" and documents we've looked  
8 at. Reynolds is telling everybody that whatever.

9 But I think beginning on line 21, if we  
10 said, if you, one of Reynolds' scientists is saying  
11 there's a controversy, it's certainly reasonable for  
12 a smoker to ignore, in essence, the Surgeon  
13 General's warnings and conclude there's no cause and  
14 effect proven. I think would put it into context  
15 and get it back to what he's asked up above.

16 In other words, he's ducked the answer  
17 above, and the lawyer was trying to pin him in with  
18 the "Frank Statement" which again, shouldn't --  
19 shouldn't be here. But I think he could certainly  
20 be asked if you as a scientist believe this then why  
21 would it be unreasonable for a lay person to believe  
22 this?

23 MR. ALDEN: As now articulated by  
24 Mr. Merkel we're into warnings, and he's asking --  
25 if that's what Mr. Merkel intends to offer this for,

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1 he's asking for some kind of undermining of warnings  
2 which is a clearly preempted area. And they have no  
3 warnings claim at all, and Mr. Rodgman is a Ph.D.  
4 chemist. He has no knowledge of what a smoker would  
5 conclude. This is all speculation and  
6 argumentation.

7 MR. MERKEL: To the contrary, Your Honor,  
8 I'm not trying to argue or undermine a warning or  
9 argue a warning period. I'm simply trying to  
10 protect or defend their claim that Mr. Nunnally was  
11 negligent for the way he acted at this point in  
12 time. And here's a scientist with all this body of  
13 knowledge who's still saying it was an open  
14 question. It was up in the air. I don't see how  
15 they could have it both ways. I mean, if they're  
16 going to say scientifically it was an open question,  
17 then why would a kid in Horn Lake, Mississippi, be  
18 expected to act differently than he did.

19 JUDGE CARLSON: Let me find out, then,  
20 what are you proposing, Mr. Merkel?

21 MR. MERKEL: To take out -- well, it

22 starts on line 7 on 119, Your Honor. He says, "So  
23 as you sit here today, it's still your testimony  
24 that there's no cause and effect with between what's  
25 proven cigarette and health problems?" The man  
1458

1 says, "That's right." Question: "So it would be  
2 reasonable for a smoker to conclude the same thing,  
3 correct?" "I don't know what a smoker would  
4 conclude." Then he says based on advertisements and  
5 the "Frank Statement", and I'm saying take outlines  
6 17 through 21, and in answer to his "I don't know  
7 what a smoker would conclude" or follow-up to that,  
8 simply say, "If you as one of their scientists say  
9 there's a controversy, it's certainly reasonable for  
10 a smoker in essence to ignore the warning label. No  
11 cause and effect proven, correct?"

12 MR. ALDEN: Your Honor, he's already  
13 answered that question in line 16. He said, "I  
14 don't know what a smoker would conclude." After  
15 that, it's really just arguing with him.

16 JUDGE CARLSON: All right. With that  
17 taken out, then, on this particular part,  
18 Mr. Merkel, then what do you propose had line 7,  
19 page 119 through where? Taking out the "Frank  
20 Statement."

21 MR. MERKEL: Taking out the stuff about  
22 the "Frank Statement", Your Honor, and then  
23 continuing from line 21, just rephrasing that as  
24 though the beginning of a question, we'd have to add  
25 a word to and then just come on down with it again.  
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1 JUDGE CARLSON: All the way down to  
2 where?

3 MR. MERKEL: Well, I think it continues  
4 on through -- I mean, that's the only little part  
5 that had a "Frank Statement" reference, just more of  
6 a continuing --

7 MR. ALDEN: Actually, it isn't, Your  
8 Honor, 121, he talks about the '54 ad at lines 18  
9 and 23.

10 MR. MERKEL: Okay. On 121, there's  
11 another ad reference?

12 MR. ALDEN: yeah, line 18, "seen that '54  
13 ad."

14 MR. MERKEL: Okay of him that's his  
15 answer. Okay. Take out from line 10 on 121 through  
16 18 on 121.

17 MR. ALDEN: Well, he doesn't --

18 MR. MERKEL: No, it continues on.

19 MR. ALDEN: We think this is all  
20 argumentative, and there's certainly no foundation  
21 for this witness testifying to any of it.

22 MR. MERKEL: All right. Let's strike,  
23 Your Honor, from lines 10 on page 121 through lines  
24 14 on 122. Does that clean the argument and the ad  
25 out before we move on to another topic?

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1 MR. ALDEN: Well, I would start the  
2 strike at page 119, and move on to another topic  
3 then.

4 JUDGE CARLSON: I'm satisfied that's to  
5 remain in starting at page 119, page 119, line 7,  
6 excluding the "Frank Statement" reference, line 17

7 through 21, picking up with a question on line 21 of  
8 page 119. Going on down, line 10, page 11, down  
9 through line 14, page 122.

10 MR. MERKEL: Yes, sir, and we would cut  
11 those.

12 MR. ALDEN: I'd object to the question at  
13 line -- page 122, line 20. That the first part of  
14 the question as it's objected to here right after is  
15 argumentative. If the question is "are nitrocomines  
16 thought to be cancer producing?" That's okay.

17 MR. MERKEL: I'm sorry. I lost you.

18 MR. ALDEN: The question that begins on  
19 page 122, line 20 is argument, and if you strike the  
20 first sentence of the question and begin with what  
21 is really the question, "are nitrocomines," we don't  
22 object. "Well, your definition of a carcinogen  
23 apparently changes over time."

24 MR. MERKEL: Okay. That's fine.

25 JUDGE CARLSON: Take out the first phrase

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1 where he's making that comment?

2 MR. ALDEN: Right, and just have the  
3 question be "Are nitrocomines thought to be cancer  
4 producing?"

5 JUDGE CARLSON: All right. What's the  
6 next objection?

7 MR. ALDEN: Page 125, they start with a  
8 new document, Plaintiffs' 691. It may not be in the  
9 collection we have here. We'd have only our same  
10 objection that what we knew and when we knew it is  
11 not relevant.

12 JUDGE CARLSON: That goes how far,  
13 starting on page 125 to --

14 MR. ALDEN: That would include -- that  
15 would go down through 128.

16 MR. MERKEL: Again, Your Honor, these are  
17 just identifications of component parts of smoke and  
18 carcinogenic features in it.

19 JUDGE CARLSON: Based on the status of  
20 the record, I'll permit it to remain in.

21 MR. ALDEN: I think the next line  
22 designation begins on page 136, line 24; is that  
23 correct?

24 MR. MERKEL: Yes, uh-huh.

25 MR. ALDEN: Here they're talking about a

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1 purported gentlemen's agreement not to conduct  
2 in-house research. That could go only to a  
3 conspiracy issue. There's no conspiracy claim in  
4 this case. What other companies did in terms of  
5 in-house research or not and whether there's an  
6 agreement simply isn't relevant here to the extent  
7 it has any minimum value, we think 403 would cover  
8 it.

9 MR. MERKEL: There's no problem, Your  
10 Honor, from the gentlemen's -- from line 24 on page  
11 136 down through line 10 on 137, we'll strike.

12 JUDGE CARLSON: Does that cover the  
13 objection on that one?

14 MR. ALDEN: It does for right there, and  
15 page 138, line 10, where they're talking about  
16 Reynolds shutting down its biological research  
17 division, we don't see how that's relevant here. He

18 does testify before that as to what they did.  
19 MR. MERKEL: You're just talking about  
20 the reference of shutting down the lab?  
21 MR. ALDEN: Right, on page 138, line 10.  
22 MR. MERKEL: Okay.  
23 MR. ALDEN: And actually, there's no  
24 answer to that question.  
25 MR. MERKEL: No answer anyway, so that's

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1 fine, those three lines.  
2 MR. ALDEN: Starting on 138, line 15,  
3 they're talking about publication of scientific  
4 research Reynolds did. A nondisclosure claim or a  
5 failure to disclose claim can only be a warnings  
6 claim. We think that that discussion starting on  
7 138 is irrelevant because there is no warnings claim  
8 in this case.  
9 MR. MERKEL: Your Honor, this isn't bound  
10 up in any question about warnings. This is 1965,  
11 1966 and 1957, '32.  
12 MR. ALDEN: But Your Honor, although the  
13 question doesn't have warnings in it, whether we  
14 published what we knew or not is relevant only to a  
15 warnings claim.  
16 JUDGE CARLSON: What's the purpose of the  
17 offer, Mr. Merkel?  
18 MR. MERKEL: Again, Your Honor, to show  
19 the same thing that was testified to yesterday.  
20 That they identified compounds, and then did not  
21 make the scientific community aware of the compounds  
22 that they had found.  
23 MR. ALDEN: Well, Your Honor, we think  
24 they can get in the identification -- well, subject  
25 to our objection, they have gotten in the

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1 identification. But this is a different issue of  
2 their publication, and that, I think, goes only to a  
3 warnings claim.  
4 JUDGE CARLSON: I'm trying to figure out  
5 the relevance as to why it's needed.  
6 MR. MERKEL: Well, again, Your Honor, I  
7 think going to the cause of the count of negligence  
8 as Dr. Burns testified yesterday. Well, first,  
9 Mr. Ulmer told the jury they were conducting  
10 experiments to identify the components and find out  
11 if any of them were carcinogenic.  
12 And then as Dr. Burns said they found a  
13 component, and once they found it, they did not  
14 disclose it to the scientific community. And this  
15 is what that -- that is part of that same thing, of  
16 what they were finding. And what they were -- what  
17 they were reporting to the scientific community  
18 about the components in smoke. And this was  
19 prewarning area. This was prior to 1966 when the  
20 label went on there. So --  
21 MR. ALDEN: It still sounds like a  
22 warnings claim to me.  
23 JUDGE CARLSON: Let me get through  
24 reading through this.  
25 MR. MERKEL: Not so much a warning on the

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1 label or the pack as it is disclosing known  
2 information to the scientific community that was

3 dealing with this problem. In other words, the  
4 whole body of knowledge that was out there, and that  
5 Mr. Joe Nunnally was supposed to have acted on and  
6 known better to smoke because of what everybody  
7 that. This was something that was fueling the  
8 controversy rather than an accepted fact that  
9 cigarettes were dangerous, the tobacco industry was  
10 continuing the question.

11 It's not a fact. It's a question. You  
12 know, there are indications of it, some say yes,  
13 some say no. But we don't think it's scientifically  
14 proven, and that's what this goes to, the  
15 continuation of the appearance of a question.

16 MR. ALDEN: That's a fraud claim, Your  
17 Honor.

18 JUDGE CARLSON: I'm sorry.

19 MR. ALDEN: That's a fraud claim, and  
20 that's not here, either.

21 JUDGE CARLSON: Again, we talked about  
22 the negligence claim, but of course, we know fraud,  
23 misrepresentation.

24 MR. MERKEL: Gone.

25 JUDGE CARLSON: All that's gone.

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1 MR. MERKEL: It's gone, Your Honor,  
2 they're not going to be instructed on any of those.  
3 But when they're instructed on their claim of  
4 comparative negligence, you should judge Joe  
5 Nunnally's actions as a reasonable person of his age  
6 and so forth under similar circumstances with the  
7 knowledge that was available to him. And this is  
8 part of the knowledge that was not available to him  
9 that kept the question or controversy about this  
10 subject matter.

11 When he was smoking from '60 to '66,  
12 there was no consensus anywhere in the world a  
13 smoker could look at and say cigarette smoking  
14 causes cancer. There was a question. From '54 on,  
15 there has been a question. And it had been  
16 maintained by this denial that there's scientific  
17 evidence. In other words, the Surgeon General on  
18 the one hand in 1957 and all of the "New England  
19 Journal of Medicine" and the various articles were  
20 saying we think there's a causal connection.

21 The information coming back on the other  
22 hand saying it's not scientifically proven, and this  
23 is indicative of what was not given to the  
24 community, the community at large, to understand  
25 whether there was a proven fact or not. And they're

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1 going to be judging what Joe Nunnally did, same  
2 thing that Teague -- that Rodgman was talking about  
3 earlier. He's saying I still don't believe there's  
4 a connection. So if he didn't believe it, and this  
5 information wasn't disclosed, how on earth can Joe  
6 Nunnally be held responsible for knowing something  
7 like that or believing something that there was this  
8 much controversy about?

9 MR. ALDEN: Your Honor, could I respond  
10 to this briefly? First of all, if you look at what  
11 we're talking about here, we're talking about a  
12 situation in the early '60s. When, for many years,  
13 it had been known that there were dozens that had



14 been established in scientific literature. That  
15 there were dozens of carcinogens among the 5,000  
16 compounds that make up cigarette smoke.

17 What we're talking about here is whether  
18 one of the dozens that Reynolds thought it had  
19 found, by what did you Dr. Rodgman testified was a  
20 fairly unreliable method, so he didn't think worth  
21 reporting, should be disclosed. And we are talking  
22 about cholanthrene. And all we're talking about is  
23 whether we should have published it. They've  
24 already gotten in that we found it.

25 That was there. All they're talking

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1 about is whether we should have published. That  
2 goes only to a fraud claim or a warning's claim.  
3 Mr. Merkel keeps referring to his vast and ever  
4 expanding negligence claim. The negligence claim is  
5 a design defect negligence claim. And as we've gone  
6 into at great length, you have to fit it into the  
7 "Prestage" factors. Even though it has a negligence  
8 label, we don't think this fits.

9 MR. MERKEL: It's a marketing negligence  
10 claim, Your Honor. And it's a defense to their  
11 comparative negligence claim against Joe Nunnally.  
12 And as Dr. Burns testified yesterday, the mouse  
13 study made no sense to anybody because of the  
14 carcinogens that were known, they could only  
15 attribute two percent of the tumors in these mice to  
16 the known list. Had this one been disclosed and  
17 analyzed with respect to Wynder's mouse study, 98  
18 percent of the tumors on those mice would have been  
19 attributed to tobacco smoke. So this was causing  
20 the scientific community to waiver and to leave this  
21 an open question.

22 MR. ALDEN: Your Honor, I think that's  
23 absolutely not what Dr. Burns testified to. That a  
24 single carcinogen in a trace amount of cigarette  
25 smoke -- had it been identified -- would have

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1 suddenly changed the scientific consensus. And in  
2 fact, Reynolds disclosed this specific carcinogen in  
3 '69, and the world didn't exactly start rotating in  
4 a different direction.

5 JUDGE CARLSON: I'm going to let it stay  
6 in after hearing argument. I'll let that stay in.  
7 What's the next objection on that tab, anyway, going  
8 down through page 150.

9 MR. MERKEL: We strike the part on 150,  
10 Your Honor. Those nine lines don't go anywhere  
11 anyway. So that would come out, but through line  
12 149. Well, looks like most of 149 is talking about  
13 breaking for lunch.

14 MR. ALDEN: Your Honor, I'm sorry. I'm  
15 way behind everybody. I'm still on page 140.

16 JUDGE CARLSON: I think --

17 MR. MERKEL: Backing up to where?

18 MR. ALDEN: I think it's moving ahead to  
19 page 140. We were arguing about 138, I think. Here  
20 on page 140, they start talking about a document  
21 that isn't an exhibit here as best as we can tell.  
22 Where they start talking about Minnesota, 1053 on  
23 page 140, line 21. It's more of the same. It's a  
24 different publication issue. It's another

25 publication issue, we think.

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1 Now you are into the preemptive period,  
2 because you are talking the '70s. It's even more  
3 clear that it can relate only to a warning claim.  
4 And Dr. Burns didn't talk about this as being  
5 critical to if the scientific community in any way.  
6 The discussion that starts on the bottom of page  
7 140?

8 JUDGE CARLSON: What portions are still  
9 being offered, Mr. Merkel?

10 MR. MERKEL: Your Honor, we've still got  
11 it all in, but give me just a second to look at it.  
12 Beginning 140 is where you are, and then coming down  
13 from there?

14 MR. ALDEN: Right, 140, line 21. The  
15 whole rest of this designation through 150 is  
16 talking really about nothing but publication during  
17 the period as I read it.

18 MR. MERKEL: We'll take it out from  
19 there, Your Honor. What line on 140?

20 MR. ALDEN: Line --

21 JUDGE CARLSON: 21.

22 MR. ALDEN: -- 21 through page 150, line  
23 9.

24 MR. MERKEL: Line 21 on page 140?

25 MR. ALDEN: Right.

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1 MR. MERKEL: Make it shorter to read.

2 MR. ALDEN: By my count, that disposes of  
3 tab 11.

4 MR. MERKEL: That what?

5 MR. ALDEN: That disposes of the infamous  
6 tab 11.

7 MR. MERKEL: Right.

8 JUDGE CARLSON: We're a little over --  
9 right at halfway through, Your Honor.

10 MR. ALDEN: I apologize for my gross  
11 inaccurate time estimate.

12 JUDGE CARLSON: Let's try to see how much  
13 further we can go, and then at some point determine  
14 how much we've got to do with the jury. I don't --  
15 number one, I don't think we can also get through  
16 with Teague.

17 MR. MERKEL: I don't think so, either,  
18 Your Honor, and I think probably if we read this one  
19 and the live witnesses that we have left today that  
20 are available, we'll probably have the day done.  
21 And maybe we -- maybe we could get together on  
22 Teague and whack it down to where we would need very  
23 little time on it.

24 MR. ALDEN: Your Honor, even here, we're  
25 now to the Rodgman on Teague. That's what the rest  
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1 of this deposition is. It's reading Teague's  
2 documents to Rodgman. Can we live or fault with  
3 Teague's, and not have Rodgman on Teague's.

4 JUDGE CARLSON: Y'all need some time to  
5 look at that in.

6 MR. MERKEL: Only a moment, Your Honor.  
7 If he's right, if all of this is going to be --

8 MR. ALDEN: If it's all nicotine, pH,  
9 ammonia and youth. And that's what we're going to

10 be fighting about with Mr. Teague's. And that's --  
11 by way of further illustration, Dr. Rodgman was an  
12 analytical chemist. He did the constituent  
13 identification. He didn't do anything, and I think  
14 his testimony is he didn't do anything with  
15 nicotine. So they're really bouncing nicotine ideas  
16 off.

17 JUDGE CARLSON: Rather have Teague's on  
18 Teague's.

19 MR. ALDEN: We don't want Teague's on  
20 Teague's, either, but that's a different issue.

21 MR. MERKEL: Is this on page 189, that  
22 document P-562, is that a Teague's document?

23 MR. DODSON: Yes.

24 MR. ALDEN: Did you confirm that, Jack?

25 MR. DODSON: Yes.

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1 MR. MERKEL: All right, Your Honor, let's  
2 do the that. Let's just strike out 178, 179, 180,  
3 81, 82, 83, 84, 85, down through the end of 189.  
4 Well, through line 17 on 189. Is that right now?

5 MR. ALDEN: And then it begins with  
6 another Teague's document.

7 MR. MERKEL: Do what?

8 MR. ALDEN: It begins with essentially, I  
9 think, the rest of what you designated is Teague's  
10 document.

11 MR. MERKEL: I was just looking at --

12 JUDGE CARLSON: Take you think the rest  
13 of the deposition of Rodgman deals with Teague's  
14 documents?

15 MR. ALDEN: I know the rest of tab 12  
16 does, which would carry it through --

17 MR. MERKEL: Yeah, I've taken out all of  
18 your tab 12, and now I'm looking at your tab --

19 MR. ALDEN: That would carry through 192.  
20 And by looking at my description of tab 13, we're  
21 talking about prenicotine, Teague's implications and  
22 activities, Woods and Harley smoke pH analysis, the  
23 youth market document, an ammonia document {} {} {}.

24 MR. MERKEL: Okay. You're on your tab?

25 MR. ALDEN: 13. At page 224, we're

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1 talking about ammonia which is a Teague's issue.

2 MR. MERKEL: Teague's ammonia. All  
3 right. What do we have beginning over here on  
4 220 -- 225? Is that still Teague's?

5 MR. ALDEN: Well, it's -- it's not  
6 Teague's directly, I don't think, it's nicotine and  
7 ammonia.

8 MR. MERKEL: All right. Let me see about  
9 that, then. Your Honor, we would strike  
10 everything -- strike it down to line 23 on page 224.  
11 That doesn't seem to be Teague's at all. But just  
12 his general understanding about what Reynolds was  
13 doing in ammoniation of tobacco.

14 MR. ALDEN: That's correct, Your Honor,  
15 but if we -- were you trying to break before? I'm  
16 not trying to deprive you of food if you were trying  
17 to tell us to go away.

18 JUDGE CARLSON: No, I'm not. I'm not  
19 certain as to what Mr. Merkel was making sure he  
20 agreed to. The last comments, I didn't know if he

21 was saying it should, or should not come out or what  
22 he was referring to.

23 MR. MERKEL: No, Your Honor, I'm saying  
24 everything down to page the 24 we would agree to  
25 take out, and I've rubbed it out. But beginning

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1 with the question, beginning on line 22 of page 224,  
2 I think that's back away from Teague's documents and  
3 just asking the gentleman about what they were doing  
4 with nicotine and ammonia.

5 MR. ALDEN: There, Your Honor, we'd  
6 object because -- and this is an objection we'll get  
7 to with Teague's also. Dr. Burns testified very  
8 clearly that he didn't know anything about how Salem  
9 cigarettes that Mr. Nunnally smoked were designed.  
10 And anything about their pH and anything about  
11 ammonia. This whole series of ammonia pH documents  
12 relate to the larger issue of nicotine spiking which  
13 Plaintiffs have admitted didn't happen here.

14 There's no evidence that ammonia was ever  
15 in a product that Joe Nunnally smoked -- the Salem  
16 product that he smoked. And in fact, we have an  
17 affidavit from Dr. Townsend who will be here to  
18 testify that Salem did not have ammonia added to it.  
19 Salem's pH from the time these documents were  
20 written -- can I step back for a second and explain  
21 why I'm talking about pH and ammonia, and what the  
22 larger context is if I could?

23 There was a theory in the early '70s in  
24 the public health community that you should enhance  
25 the nicotine transfer or the amount of nicotine in

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1 cigarettes. And that because the bad guy was tar,  
2 and nicotine was why people smoked, you should make  
3 a high nicotine, low tar cigarette. Reynolds  
4 experimented with that as did other cigarette  
5 companies. And there is a number of other documents  
6 that reflect Reynolds experimented with that. The  
7 problem was in terms of the taste of the product you  
8 can't or at least Reynolds hasn't made an acceptable  
9 high nicotine, low tar cigarette. It just doesn't  
10 taste good. You can add all the nicotine you want,  
11 but people won't buy it.

12 One of the ways that they were  
13 postulating was that you could effect the amount of  
14 nicotine was change the pH in the smoke. And the  
15 higher the pH, or the more impact or more free  
16 nicotine you have. And there was a thought if you  
17 made a more basic smoke akin to that of a cigar,  
18 which is about seven or eight. It would speed the  
19 nicotine transfer and make a lower nicotine  
20 cigarette seem as if it were a higher nicotine  
21 cigarette.

22 And that's what they're talking about  
23 when they talk about pH, and ammonia was the vehicle  
24 people postulated you could use if you add ammonia  
25 as a base, you could increase the pH. The theory

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1 was if you increase the pH, you make more free  
2 nicotine. So the smoker perceives a bigger nicotine  
3 effect than they would notwithstanding the amount of  
4 pH -- I mean notwithstanding the amount of nicotine  
5 reflect in the disclosed nicotine level.

6           Anyway, all of this is an incredibly  
7 complicated and long way of saying they did a heck  
8 of a lot of experimentation with altering pH. With  
9 adding ammonia to alter pH, with adding various  
10 salts and other things to increase the amount of  
11 nicotine, but they didn't do it. It didn't taste  
12 good. It wasn't a good product.

13           And in fact, if you look at the product  
14 that's at issue here, Salem, it's pH not only didn't  
15 go up, it went down over time. And that's what  
16 Dr. Rodgman has testified to in an affidavit.  
17 That's what one of our exhibits will show. I can  
18 give you the affidavit if you like me to. I'm  
19 sorry, I meant Dr. Townsend, will be a witness, will  
20 be here live. But basically, our point is this  
21 didn't happen. It didn't happen with this product.  
22 There was a great deal of experimentation. It's  
23 being offered for the improper purpose of trying to  
24 show spiking and manipulation which is not in this  
25 case. And it shouldn't be in this case, because it  
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1     didn't happen to the product that Mr. Nunnally  
2     smoked.

3           MR. MERKEL: Time out. Your Honor, we'll  
4 strike it. I think it's -- after hearing him  
5 describe it, I don't have enough time in closing  
6 argument to explain it. So we'll just voluntarily  
7 withdraw it and worry about it in Teague's. I mean,  
8 there's some of it in his, if we want it, we'll get  
9 it out of him and not had this one.

10          JUDGE CARLSON: Why don't we do this,  
11 this would be a good time to stop for -- we've got  
12 roughly 50 minutes before the jury will be back. We  
13 all need time to get a bite to eat and kind of  
14 regroup and be prepared for the jury, and I, of  
15 course, have no idea time wise how long it will take  
16 to read to the jury those portions.

17          MR. ALDEN: Your Honor, there are seven  
18 tabs left.

19          JUDGE CARLSON: Right.

20          MR. ALDEN: You're in charge. You're  
21 right.

22          JUDGE CARLSON: I just feel like if we  
23 keep on working trying to get through this, we'll be  
24 working right up to 1:30, if we're done by 1:30.  
25 And that means putting the jury in the box and going  
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1     straightforward. I think it will be better to stop  
2 here and let y'all regroup and maybe go over what's  
3 left, and see if there is -- y'all are being pretty  
4 agreeable trying to come to some agreement with it.  
5 And see if there's anything left that can come out  
6 by agreement or by objection withdrawn.

7           MR. MERKEL: All right, sir.

8           JUDGE CARLSON: I think we've got enough  
9 to get before the jury for a while before a break.  
10 I didn't realize, Mr. Merkel, you do have other live  
11 witnesses also.

12          MR. MERKEL: Yes, sir.

13          JUDGE CARLSON: That would negate the  
14 need to deal with Teague's today. Let's break until  
15 1:30.

16                   (A lunch break was taken.)

17 JUDGE CARLSON: Dr. Rodgeman's  
18 deposition, where we stand, if we need to deal with  
19 it now, go ahead and get started with the jury and  
20 deal with it later?

21 MR. MERKEL: Judge, we've got only one  
22 other little section at the end of the thing that's  
23 the only thing that's the left in question.

24 JUDGE CARLSON: Okay. Why don't we go  
25 ahead and deal with it now and deal with the jury

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1 hopefully uninterrupted.

2 MR. ALDEN: Are we on page 429?

3 MR. MERKEL: Right.

4 MR. ALDEN: We have no objection up to  
5 431, line 9.

6 JUDGE CARLSON: I'm sorry, what's the  
7 page numbers?

8 MR. ALDEN: I'm sorry, we're up to page  
9 429, line 14, which is tab 17, I think. And our  
10 first our objection would be at 431, line 9. Where  
11 it's asking for speculation. And that would just  
12 be --

13 MR. MERKEL: That would be through the  
14 end of that page 429?

15 MR. ALDEN: That's correct.

16 MR. MERKEL: That's all right. We can  
17 take that out, Your Honor.

18 JUDGE CARLSON: 429?

19 MR. ALDEN: 431, lines 9 through 25.

20 JUDGE CARLSON: Okay, 431.

21 MR. MERKEL: What about 32 and 33?

22 MR. ALDEN: We don't object. Well,  
23 beginning on 433 and through 434, he's talking about  
24 his work for the lawyers, and they're trying to  
25 embarrass him by the sheer number of privilege

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1 documents that he wrote which I would submit is  
2 inappropriate at the top of 434.

3 MR. MERKEL: What line does that start  
4 on? Where the lawyer stuff is.

5 MR. ALDEN: Starts on 433, line 23 and  
6 carries over.

7 MR. MERKEL: Okay. Take that out, Your  
8 Honor.

9 MR. ALDEN: That would probably carry  
10 through 435, line 8.

11 MR. MERKEL: That's fine. Okay. And  
12 we'll go to the end on that?

13 MR. ALDEN: If you take out the lawyer  
14 garbage, yeah?

15 MR. MERKEL: Where is some more lawyer  
16 garbage?

17 MR. ALDEN: Lacado and McDemott.

18 MR. MERKEL: That's fine, Your Honor.  
19 We're going to cut that out where it is.

20 MR. ALDEN: Tab 18 is out. Tab 19 I  
21 guess we have to talk about.

22 MR. MERKEL: Okay. Now, where are we?

23 MR. ALDEN: Page 441.

24 MR. MERKEL: What's objected there?

25 MR. ALDEN: I don't think his knowledge

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1 is relevant, but that would be our only objection.

2 MR. MERKEL: I'm sorry, I --  
3 MR. ALDEN: His knowledge about the  
4 lifetime exposure of a smoker.  
5 MR. MERKEL: We'll take that out. I  
6 don't think it adds anything anyway.  
7 MR. ALDEN: The whole 441, 442?  
8 MR. MERKEL: Let's see. That's fine.  
9 MR. ALDEN: And the last one, I think the  
10 last one that hasn't been withdrawn is tab 20.  
11 MR. MERKEL: Tab 21?  
12 MR. ALDEN: I think 20 -- page 443.  
13 MR. MERKEL: Premier stuff?  
14 MR. ALDEN: Right. We don't object to  
15 Premier as a subject matter, but Dr. Rodgman had  
16 left the company before the marketing of Premier  
17 started. And he's also talking about at page 444,  
18 line 15, advertising done in connection with are  
19 Premier which, again, was after Dr. Rodgman left the  
20 company. So he has no personal knowledge. Premier  
21 was introduced in 1988. Rodgman, I believe, retired  
22 in '87.  
23 MR. MERKEL: That's okay. We'll just  
24 strike the whole thing from page 443 down.  
25 JUDGE CARLSON: All right.  
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1 MR. ALDEN: I think that's it.  
2 JUDGE CARLSON: All right.  
3 MR. ALDEN: Our counter designations, do  
4 we need to deal with later?  
5 JUDGE CARLSON: You've got portions  
6 designated to read?  
7 MR. ALDEN: They're not that short.  
8 MR. MERKEL: None of yours are  
9 interspersed in ours?  
10 MR. ALDEN: Right.  
11 MR. MERKEL: Do you want to just use them  
12 in your case-in-chief? I mean, if we were taking  
13 something out of context, and leaving it out and you  
14 wanted to put it in for continuity and the sense of  
15 the document and all that.  
16 MR. ALDEN: I think it would make more  
17 sense if we did it with it. But I suspect your  
18 objections will be less than mine have been to  
19 yours.  
20 MR. MERKEL: They usually are.  
21 MR. ALDEN: I would think that at least  
22 potentially we could have Mr. Merkel stand and  
23 object to the extent he wants to. And I think there  
24 will be sufficiently few that we might be able to do  
25 it live.  
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1 MR. MERKEL: I don't know. I'm just  
2 not -- I haven't reviewed your thing in that much  
3 depth.  
4 MR. ALDEN: Can we maybe do it at a  
5 break?  
6 JUDGE CARLSON: Let's try to deal with it  
7 at a break.  
8 MR. MERKEL: Thank you, Your Honor.  
9 (Off the record.)  
10 (Jury enters courtroom.)  
11 JUDGE CARLSON: All right, ladies and  
12 gentlemen, we are ready to go forward. This clock

13 is wrong, by the way. Jump ahead sometimes, we  
14 might be about five or six minutes late getting  
15 started, but it's not that late. But we all agreed  
16 maybe later on in the day we might use this as the  
17 official clock here to recess. But anyway, we are  
18 now ready to go forward. And since you have had the  
19 break, I need to find out if you'd had occasion to  
20 talk to anybody or any outside information you've  
21 gained about the case? Anything? If not, we'll  
22 move forward at this time.

23 MR. MERKEL: Call Dr. Gerald Lee.

24 JUDGE CARLSON: Sir, if you could pause  
25 for just a moment and let the clerk swear you in.

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1 GERALD LEE, M.D.,  
2 having been first duly sworn, was examined and  
3 testified as follows:

4 DIRECT EXAMINATION BY MR. MERKEL:

5 Q. Hi, Dr. Lee.

6 A. Good morning.

7 Q. Would you identify yourself, please, to  
8 the jury and the Court?

9 A. Why yes, sir. My name is Gerald Lee.

10 Q. And tell us a little bit about your  
11 educational background, please.

12 A. Okay. I have a bachelor of science  
13 degree in accounting from Mississippi College that  
14 was in 1962. I have a master of science in business  
15 administration from the University of Southern  
16 Mississippi in 1964. And I have a doctor of  
17 philosophy in economics from the University of  
18 Mississippi in 1973.

19 I also attended the University of Chicago  
20 during the summer of 1973 on a general elected  
21 fellowship.

22 Q. And what do you presently do? What is  
23 your current occupation. And explain to the jury,  
24 if you would, what that entails, please?

25 A. I teach economics in the school of

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1 business at Mississippi College. I've been there  
2 since 1970. And the field of economics deals with  
3 the production, and distribution and income of goods  
4 and services. It's a study of mankind making a  
5 living.

6 Q. And does that study or the work that you  
7 do in relation to the field of economics, does it  
8 involve the use of discount rates, interest rates  
9 and calculations of present values of future streams  
10 of income?

11 A. It is. It does.

12 Q. Explain to the jury, if you would, what a  
13 present value calculation is designed to do? What  
14 we're talking about when we use that term.

15 A. The present value calculation is designed  
16 to reduce future income to its present value. And  
17 the reason that we do that is because present -- the  
18 value of an income in the future is worth more than  
19 than it is now. For instance, if I took a hundred  
20 dollars today and invested that at a local bank at  
21 three percent, after one year, I would have \$103 on  
22 hand.

23 That's the hundred dollars that I



24 invested, plus the three percent that I earned. But  
25 I could turn that around and say that \$103 a year

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1 from today is only worth \$100 today. That's because  
2 of the ability of money to earn interest. And so  
3 it's proper when you're taking income in the future  
4 to recognize that it has the ability to earn  
5 interest and reduce it to its present value. Just  
6 like I took the \$103 a year from today and reduced  
7 that to \$100 today.

8 MR. MERKEL: Your Honor, we would offer  
9 Dr. Lee as an expert in the field of economics for  
10 the purpose of performing a present value  
11 calculation of the lifetime earnings of Joe  
12 Nunnally.

13 MR. LISTON: We don't care to voir dire  
14 the witness at this time.

15 JUDGE CARLSON: All right, sir, then the  
16 Court will declare the witness as an expert in the  
17 field so offered.

18 Q. (By Mr. Merkel) Dr. Lee, were you  
19 contacted by my office and asked to perform a  
20 present value calculation for use in this particular  
21 case, the Joe Nunnally case?

22 A. I was contacted, yes.

23 Q. Would you explain to the jury what you  
24 need in order to perform a calculation like that,  
25 what information needs to be available to you to do

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1 it, and then -- well, let's just deal first with the  
2 knowns that you take.

3 A. Okay. In any kind of present value  
4 calculation, there are basically three components.  
5 One component is the income that's going to be  
6 earned. The second component is the time period  
7 over which it will be earned, and the third  
8 component is what's called the "discount rate." A  
9 moment ago when I gave you an illustration of  
10 reducing it back to its present value, you have to  
11 have an interest rate to reduce it back to its  
12 present value. So those are the three components of  
13 any kind of present value calculation.

14 Now, in performing the calculation of  
15 this type and assembling those components, there are  
16 various things that I need. For instance, to  
17 establish the time the period, I need to know the  
18 person's age. I need to know their education. I  
19 need to know their sex. Because making this  
20 projection over what's called a "work life  
21 expectancy" and how long you're going to remain in  
22 the labor force is determined by how old you are  
23 when you die. How much education you had and your  
24 sex. And you can get this information from a  
25 publication of the federal government. The

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1 Department of Labor publishes a work life expectancy  
2 table. So I utilize that to establish the time  
3 period over which I'm going to discount this income  
4 stream.

5 Now, bear in mind you only discount  
6 future earnings. Past earnings you do not discount.  
7 I also need to establish the level of income. So in  
8 order to do that, it's best if I have some

9 documentation about how much a person has been  
10 earning. And so I need to be able to do that. A  
11 third -- well, in conjunction with the income  
12 stream, there's some adjustments that need to be  
13 made. I reduce that income stream for taxes. I  
14 reduce the income stream for personal consumption of  
15 the decedent. And then I would also add back any  
16 fringe benefits that this decedent would have  
17 earned. Things like fringes that are not paid --  
18 that do not show up in your paycheck.

19 Then the third thing that I need to do is  
20 to establish a discount rate. And what we  
21 frequently do here in this area is we have a net  
22 discount rate. That is we take a discount rate or  
23 an interest rate based on the yield on government  
24 bonds. And from that, we reduce that discount rate  
25 for the expected growth in the income stream. That

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1 is people earn -- they get raises as time goes by.  
2 So we use a net discount rate, and that's what I'm  
3 doing. That's the basic kind of information that I  
4 would need.

5 MR. MERKEL: Okay. Your Honor, at this  
6 time, we would offer into evidence Plaintiff's  
7 Exhibit P-4 which is an extract from the Social  
8 Security Administration of Joe Nunnally's earnings.

9 MR. LISTON: We have no objection.

10 JUDGE CARLSON: Be marked and received  
11 into evidence.

12 (Exhibit P-4 marked for identification  
13 and entered into evidence.)

14 Q. (By Mr. Merkel) I hand you this,  
15 Dr. Lee, and ask you to take a glance at that and  
16 see if that is, in fact, the information on  
17 Mr. Nunnally's earnings which you used to perform  
18 your calculations?

19 A. Yes, sir, I used a copy of this.

20 Q. Okay, sir. Would you start with the  
21 calculation you made, and to the extent there are  
22 other assumptions involved, that's the source of the  
23 earnings information, tell us whatever fixed factual  
24 information you relied on. And then what  
25 assumptions you've made before we start the

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1 calculation, please, Dr. Lee.

2 A. Okay. I was given that Mr. Nunnally was  
3 born June 11th, 1952. That he died September 1,  
4 1989. I calculated his age at the time of death,  
5 and that was 37.2 years. I looked to see what the  
6 life expectancy of a white male would have been at  
7 that age and determined it's 38.6 years. But  
8 that's -- I included that, but I don't really use  
9 that.

10 What I use for making the calculation is  
11 something called the work life expectancy which is  
12 going to be less than the life expectancy. Work  
13 life expectancy is how long a person is expected to  
14 remain active in the labor force. And a --  
15 Mr. Nunnally had -- he was a high school graduate,  
16 and 14 years of education. So utilizing that, he  
17 had 23.4 years of work life expectancy at that time.

18 Q. Now, let me ask you about that before you  
19 move on, Dr. Lee.

20 A. Sure.  
21 Q. He was 37, and you say he's got a 23 year  
22 life expectancy. That would put him at 60. some  
23 years, and we normally think of retirement as being  
24 65 or even 70 or something.

25 A. Yeah.

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1 Q. Why is the work life expectancy less than  
2 calculating out to age 65?

3 A. Work life expectancy anticipates, based  
4 on historical studies, it anticipates various things  
5 that may move you from the labor force, even if it's  
6 temporary. Even if it's temporary, such things as  
7 unemployment, sickness, disability, death, early  
8 retirement, and other factors. But all of those  
9 kinds of things are considered. And so even if  
10 you're -- even if you're temporarily absent from the  
11 labor force, that is included. And so that's why it  
12 appears that I have him retire at age 60. And we  
13 oftentimes think of 65, but again, there may be  
14 interruptions.

15 Q. Well, from the standpoint of the jury's  
16 understanding of the thing, if you had used another  
17 five years to 20 -- 28 years instead of 23, getting  
18 him out to the 65, and assuming that was what he  
19 would have worked because he was industrious, he was  
20 energetic and so on.

21 A. Yes.

22 Q. What is the effect of that on your  
23 calculation? Does that make your calculation  
24 conservative, more, less, how would you describe it?

25 A. If I had used 28 years instead of 23

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1 years, my estimate would be higher. Because he  
2 would have worked longer, and I would have  
3 calculated it over a longer period of time. So if I  
4 had used age 65 or age 70, my figures would have  
5 been higher than what I have done.

6 Q. All right, sir. Fine. Go ahead with  
7 your explanation, please.

8 A. Okay. Now, as Mr. Nunnally died, let's  
9 see, as he had died in 1989, that was almost 11  
10 years ago. And so September -- in September, it  
11 would be 11 years. So 10.8 years would be in the  
12 past, and you don't discount that. What's in the  
13 future is 12.6 years. And that's if time period  
14 remaining, and that's the time period I'm going to  
15 discount this figure over. Then I established --

16 Q. Let me ask you something on that,  
17 Dr. Lee.

18 A. Surely.

19 Q. The part that's in the past, that's  
20 already would be earned and hasn't been earned, do  
21 you provide interest on that money that has already  
22 been earned, I mean, if he had gotten it in 1990,  
23 say, he would have had the money earning interest  
24 for 10 years. How do you allow for that?

25 A. I did not. It's my understanding you're

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1 not supposed to do that. Economically, you should  
2 do that. But it's my understanding that you don't,  
3 so I did not include any prejudgment interest.

4 Q. So as far as any amounts that he would

5 have earned in the past, you've included no interest  
6 on them. They're in at face value?

7 A. That's correct.

8 Q. All right, sir.

9 A. To the determine the level of income, I  
10 utilized his earnings the year before he died, which  
11 was the earnings for 1988. And that earnings was  
12 \$44,450. But again, that was so long ago that we've  
13 had inflation that has changed that, that is I  
14 corrected this to 1999 dollars. And I used the  
15 Consumer Price Index to do this. The Consumer Price  
16 Index is utilized for the same purpose to adjust  
17 Social Security earnings.

18 It is also used to adjust income tax  
19 rates for deductions and things like this. So this  
20 is a common type of utilization of the Consumer  
21 Price Index. So when I adjusted that to 1998  
22 dollars, \$44,450 turns out to be the \$61,246. What  
23 that's saying is it would take -- in 1998, it would  
24 take \$61,246 to have the same purchasing power in  
25 1998 that \$44,450 had in 1989, okay.

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1 Q. Let me ask you one about that.

2 A. Surely, surely.

3 Q. Did you increase the earnings from 1989  
4 up to today, the year 2000, by that same factor when  
5 you were calculating his already past -- past  
6 portion of his earnings, or did you do it at a  
7 straight 44,000?

8 A. No, I utilized the 61,246 all the way  
9 through. Because I'm -- I'm trying to compensate  
10 with purchasing power. And as I mentioned, it would  
11 take \$61,246 in 1998 to have the same purchasing  
12 power as 44,000 had in 1989.

13 Q. All right, sir.

14 A. I added back fringe benefits. And the  
15 only fringe benefit I assumed was the employer's  
16 contribution to the FICA contribution, that's for  
17 Social Security, things like that. I added that  
18 back to, because the employer contributes half of  
19 that. Then I also made an adjustment for personal  
20 consumption. And this varies with the size of the  
21 family. There were four children and a wife  
22 involved in this family. And so the personal  
23 consumption ranged from 18 percent to 30 percent.  
24 That is I'm reducing the income stream for  
25 Mr. Nunnally's personal consumption.

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1 And when I say personal consumption,  
2 these are things that he would have consumed that  
3 would not have benefited the family. See, there are  
4 many things within a family that we jointly share.  
5 For instance, the mortgage doesn't go down, the  
6 electricity bill doesn't go down, the car payment  
7 doesn't go down. A lot of things do not change with  
8 the size of the family. It would only be personal  
9 items, and so I made a reduction based on a commonly  
10 used study by a fellow by the name of Earl Shep.

11 He made this study back in 1961, and we  
12 still utilize those percentages. I also reduced it  
13 by the income tax rate on \$61,246. That turns out  
14 to be 16.5 percent. I'm taking out taxes from this  
15 calculation. So those are the adjustments that I'm

16 making for the income stream. I'm taking the  
17 \$61,246, adding back 7.6 percent FICA contribution  
18 by the employer. Taking out personal expenditures,  
19 and I'm also taking out taxes to arrive at an  
20 adjusted income stream.

21 The next component is to select the  
22 discount rate to discount these future earnings back  
23 to its present value. And to do this, I looked at  
24 the interest rate on three and 10-year bonds from  
25 1993 to 1997. That was 6.2 percent. I subtracted

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1 from this the income growth rate over that same  
2 period of time, which was 3.2 percent. So I arrive  
3 at a net discount rate of three percent, and then I  
4 discounted those future earnings back. May I go  
5 ahead and --

6 Q. Yes, please.

7 A. When you look at the \$61,246 earned over  
8 a work life expectancy of 23.4 years, that turns out  
9 to be \$1,433,156. From that, I subtracted taxes of  
10 \$236,471. I added back fringe benefits of \$108,920,  
11 to arrive at an after-tax income of \$1,305,605.

12 From that, I subtracted personal  
13 consumption expenditures of \$299,285, arriving at an  
14 adjusted income, after personal expenditures of  
15 \$1,006,321. Then I brought that back to its present  
16 value, and that turns out to be \$930,682.

17 Q. Now, to sort of sum up, Dr. Lee, if we  
18 were assuming that Joe Nunnally would have continued  
19 to earn at least to age 60 where you've got him --

20 A. Yes, sir.

21 Q. -- the effect of what your figure is of  
22 \$930,000, that would be the same as him drawing the  
23 his regular salary each year along the way until he  
24 got to be 60?

25 A. That's correct.

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1 Q. And the methodology that you used to do  
2 this, is this a generally accepted method for  
3 calculating a present value for a future stream of  
4 income?

5 A. This is the correct way to do it.

6 Q. And the assumptions you made are  
7 characteristic of what economists do in performing  
8 this type calculation?

9 A. Yes, they are.

10 Q. And do you have an opinion to a degree of  
11 certainty as an economist and financial calculator  
12 that these figures are correct?

13 A. Yes, I would defend these figures, yes.

14 MR. MERKEL: Thank you, Dr. Lee. We  
15 tender the witness, Your Honor.

16 JUDGE CARLSON: Mr. Liston.

17 MR. LISTON: Yes, sir.

18 CROSS EXAMINATION BY MR. LISTON:

19 Q. How are you, Dr. Lee?

20 A. Mr. Liston, how are you today, sir.

21 Q. Fine, thank you. I just have a few  
22 questions today for you. I guess a friend that I  
23 had that's now dead used to be in this business  
24 also, came from Ole Miss, and you know who I'm  
25 talking about.

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1 A. Dr. Oliver, yes, sir.  
2 Q. And he said many times that really the  
3 only thing I do when I get on that witness stand is  
4 be a talking adding machine. Do you sort of agree  
5 with that?  
6 A. Yes, sir, yes, sir.  
7 Q. All right.  
8 A. I think we add a little judgment to it,  
9 and Dr. Oliver did add some judgment to his  
10 calculations.  
11 Q. They were argued about quite a bit, too.  
12 A. Yes, sir.  
13 Q. Some of the information that you used to  
14 arrive at the bottom line figure is actual factual  
15 information that applies to Joseph Nunnally and  
16 Joseph Nunnally, only; is that correct?  
17 A. That's correct.  
18 Q. And that, of course, is his age?  
19 A. That's correct.  
20 Q. And that's unique -- or birthday, that's  
21 unique to that man, insofar as your calculations are  
22 concerned?  
23 A. Yes, sir, it was.  
24 Q. You also based it on something else that  
25 was unique to him. And that was his earnings, his  
1500  
1 historical earnings before his date of death; is  
2 that correct?  
3 A. That is correct.  
4 Q. And those were Joe Nunnally's earnings?  
5 A. Yes, sir.  
6 Q. Not some statistic somewhere?  
7 A. That's correct.  
8 Q. Okay. From that point on, though, your  
9 calculations are based on assumptions, are they not?  
10 A. They are.  
11 Q. And one of those assumptions -- and it  
12 has -- would have an effect on the end number -- is  
13 how long this person would actually live and not  
14 only live but be in the work force and earn money;  
15 is that correct?  
16 A. Is it about being in the work force. I  
17 included the life expectancy. But I did not utilize  
18 that. I used the work life expectancy to make the  
19 calculation.  
20 Q. Well, I understand that, but a work life  
21 expectancy of a person can certainly not exceed his  
22 life expectancy, can it?  
23 A. Yes, that's correct, and that's built  
24 into it. As I mentioned a moment ago, that's built  
25 into it.  
1501  
1 Q. But that figure that you use, and I  
2 believe you came up with a work life expectancy  
3 of --  
4 A. 23.4 years.  
5 Q. 23.4 years?  
6 A. Yes, sir.  
7 Q. That may or may not be unique to Joseph  
8 Nunnally, even disregarding the fact that he died in  
9 1989; isn't that correct?  
10 A. It is not unique to him. This is a --  
11 this is an average figure. That is when you're

12 doing this little thing, some people work longer,  
13 some people will not work as long. And so it's an  
14 average type of figure.

15 Q. And you didn't know Mr. Nunnally, did  
16 you, Doctor?

17 A. No, sir.

18 Q. You don't know what his habits were  
19 before he died and, for instance, whether he over  
20 indulged in things that might have affected his work  
21 life expectancy?

22 A. I do not. I did not know it.

23 Q. And as a matter of fact, how you get to  
24 this mean or the average in here that the government  
25 uses is there's some people below that that won't  
1502

1 live and work that life expectancy, and some are  
2 above it; is that correct?

3 A. That's correct.

4 Q. And you don't know whether Mr. Nunnally,  
5 other than the event that caused his death, would  
6 have worked that period of time or not, do you?

7 A. No, I don't.

8 Q. And if he didn't, then your figure would  
9 not be correct?

10 A. If he did not, my figure would not be  
11 correct. And if he worked longer than that, my  
12 figure would not be correct.

13 Q. Certainly. But that, again, is something  
14 that is unique to that individual. That we don't  
15 know about, you don't know about, and we don't know  
16 about.

17 A. Okay. That's right.

18 Q. Now, the other thing I'd like to discuss  
19 with you a moment is so that I can understand it.  
20 When you get to computing the discount rate. And  
21 the -- as I understand this much of it, the higher  
22 the discount rate that you use, the less the bottom  
23 figure -- figure would be?

24 A. That's correct.

25 Q. All right. The lower the discount rate  
1503

1 is, the higher the present net cash value is?

2 A. That's correct.

3 Q. All right, sir. And you compute that, as  
4 I understand from your work sheet, that you began  
5 with an interest rate on United States Treasury  
6 Bonds for a five-year period from 1993 to the '97.

7 A. That's correct.

8 Q. Four-year period.

9 A. Well, actually, it is a five-year period.  
10 Because I used '93 through '97, so it is actually a  
11 five-year period.

12 Q. And that -- and that's 6.2 percent?

13 A. That is correct.

14 Q. Which means that if you went out and  
15 bought a -- if you could buy a \$100 treasury bond  
16 and you would get 6.2 -- well, \$6.20 a year off of  
17 it?

18 A. That's correct.

19 Q. And then, but you didn't use that as the  
20 discount rate?

21 A. I did not. You're right. I used a net  
22 discount rate.

23 Q. Yes, sir. And to get to that net  
24 discount rate of three percent, you subtracted 3.2  
25 percent from the bond rate; is that correct?

1504

1 A. That is correct.

2 Q. And that 3.2 percent you label as "income  
3 growth rate"?

4 A. That's correct.

5 Q. What are the -- what are the elements of  
6 the income growth rate? What things are included in  
7 that? I guess the government does this or you  
8 economists do it. What factors are included in that  
9 to determine that growth rate?

10 A. I looked at the economic report of the  
11 President. This is included every year. It's  
12 compiled by the Council of Economic Advisors. And  
13 so I looked to see what the growth rate had been in  
14 average weekly earnings, and that was the basis for  
15 that.

16 Q. Would that growth rate include raises  
17 that a person got because they were doing their  
18 job better, or through longevity in the job, what I  
19 call, productivity increases?

20 A. Yes.

21 Q. And then another element would be cost of  
22 living increases; is that correct?

23 A. That's correct.

24 Q. All right, sir. And that, simply, is  
25 inflation, isn't it?

1505

1 A. Right.

2 Q. Yes, sir.

3 A. So the reason I utilize this kind of  
4 figure -- did you want me to respond to that?

5 Q. No, I asked you. That includes  
6 inflation?

7 A. Yeah.

8 Q. I mean, it is inflation; is it not?

9 A. It is inflation, and the -- the weekly  
10 increase in average weekly earnings, it includes  
11 inflation, it includes longevity, it includes  
12 productivity. It's all of those things for which  
13 people get raises. And so this is the population as  
14 a whole. And the reason I utilize that I have seen  
15 folks try to break this out into inflation and  
16 productivity.

17 I decided against that because I'm not  
18 trying to isolate the productivity portion, or the  
19 inflation portion or the longevity portion. I'm  
20 just looking at what is happening to average weekly  
21 earnings in the United States, and that's the way I  
22 arrived at that.

23 Q. But if you took the inflation out of this  
24 figure, this 3.2 percent --

25 A. Yes.

1506

1 Q. -- whatever part it plays in getting to  
2 that figure, then that would lower the amount that  
3 you would subtract from the money that you got from  
4 the bonds, would it not?

5 A. You mean if I took inflation out of the  
6 3.2 percent?

7 Q. Right.



8 A. Yes, it would.  
9 Q. And when you lower that, then you have  
10 a -- wind up with a higher discount rate, do you  
11 not?  
12 A. You would, but I don't know why you would  
13 want to do that.  
14 Q. Well, one reason may be, Doctor, and  
15 you've been in this business a long time, you  
16 understand that the guidelines that we do this the  
17 on, lawyers and economists in Court, is that the  
18 sense that inflation is unpredictable as far as the  
19 courts in Mississippi are concerned; isn't that  
20 correct?  
21 A. I'm not sure about that. It's not at the  
22 federal level. Because at the federal level, you do  
23 take this out. You do take this into consideration.  
24 But the inflation is no more predictable than  
25 interest rates are predictable. If we look back,  
1507

1 for instance, at the 1970s, what we see in the 1970s  
2 is that interest rates on government bonds went up  
3 into the 13, 14, 15 percent.

4 Of course, this was also a time period in  
5 which inflation had gone -- was going up at a double  
6 digit rate. So what economists are aware of is  
7 this. Is that interest rates and inflation move up  
8 and down together. They move up and down together.  
9 And so you can't -- I think it's improper what you  
10 are suggesting is that we should -- we should not  
11 take inflation into consideration. Because it  
12 influences the interest rate.

13 Q. I'm not suggesting you do your work any  
14 particular way, Doctor. I'm just trying to  
15 understand this. And I know we probably have people  
16 on the jury that understand it as well or a lot  
17 better than I do, and maybe as much as you do. But  
18 if you had to take inflation out of the income  
19 growth rate, if there was some rule that said you  
20 can't really use future inflation in determining the  
21 present net cash value of a person's work life  
22 expectancy. Just assume that there's a rule like  
23 that.

24 A. All right, sir.

25 Q. How much would that reduce this 3.2

1508  
1 percent?

2 A. It would reduce it -- you would be left  
3 with an income growth rate of around 1 percent.

4 Q. All right. And if you subtract that --  
5 using your methodology, if you subtract that from  
6 the rate you get on the treasury bond, then what  
7 would be your discount rate?

8 A. It would be 5.2 percent.

9 Q. All right. Can you compute using that  
10 discount rate, what Mr. Nunnally's present net cash  
11 value of his work life expectancy would be?

12 A. I can give you an approximation. The  
13 thing that would --

14 Q. That would be good enough.

15 A. The thing that would upset it a little  
16 bit would be this -- I'm using various rates of --  
17 of personal consumption. But let me see what I can  
18 do for this. That would turn out to be \$899,312.

19 Q. How about \$30,000 less than what you came  
20 up with?

21 A. That's correct.

22 Q. Let me see if I need your help on  
23 anything else here, Doctor.

24 A. All right.

25 Q. The -- the creation of the present net

1509

1 cash value anticipates that that would be a lump sum  
2 paid today; is that correct.

3 A. That is correct.

4 Q. And if you took your lump sum of \$930,000  
5 and you invested it in those treasurer bonds that  
6 you're talking about here --

7 A. Yes.

8 Q. -- how much would that yield annually  
9 without spending any of the principal?

10 MR. MERKEL: Your Honor, we would object  
11 to that. There's no basis for any argument that  
12 that would be appropriate under any aspect of  
13 Mississippi law.

14 JUDGE CARLSON: I overrule the objection.

15 Q. (By Mr. Liston) Go ahead and answer.

16 A. That would generate \$57,702 a year.

17 Q. 57, what Doctor?

18 A. 57,702, 57,702.

19 Q. I'm sorry, I didn't mean to interrupt  
20 you.

21 A. That's okay. Sometimes I slur.

22 Q. And that would be \$57,000 every year for  
23 the anticipated work life expectancy of  
24 Mr. Nunnally; is that correct?

25 A. That's what it would generate on a yearly

1510

1 basis. And I need to point out that almost 11 years  
2 have already passed in which this income has been  
3 done without.

4 Q. I understand that.

5 A. And so had this been paid back in 1989,  
6 the figure would have been much smaller.

7 Q. Well, what it would amount to is that it  
8 would -- if that that's already accrued, what I  
9 call, defacto earnings?

10 A. Yes, and that's -- I used the term "done  
11 without." That's income that had been done without.

12 Q. If you took that out of that figure, your  
13 present value is 494,000 --

14 A. That's correct.

15 Q. -- is that correct? If you took that out  
16 of the 930 --

17 A. All right.

18 Q. -- it leaves you pretty close to 500,000  
19 or 400 and something.

20 A. 436,561.

21 Q. All right, sir, and what would that earn  
22 with the treasury bonds?

23 A. 27,067, that's 2-7-0-6-7.

24 Q. And that would be every year from 2001  
25 through 2013; is that correct?

1511

1 A. Yes.

2 Q. And that would not -- if you -- that  
3 would not invade that \$436,000?

4 A. That is correct.  
5 Q. At all. And at the end of 2013 -- 2013,  
6 you would have paid the person \$27,000 a year and  
7 still had \$436,000 left; is that correct?  
8 A. That is correct. I need to point out  
9 that's still about \$40,000 shy of what he would have  
10 been earning.  
11 Q. All right, sir. I thought the purpose of  
12 this was to -- to restore a stream of income over a  
13 determinate or finite period of time?  
14 A. It is.  
15 Q. At the end of which you wouldn't have any  
16 money left; isn't that correct?  
17 A. That is correct.  
18 Q. But if you put this in on those treasury  
19 bonds, you would still have -- and if you took out  
20 enough to make up the annual amount -- you'd still  
21 have about \$400,000 left, wouldn't you?  
22 A. I think that's a little bit confusing.  
23 Let me try to explain that confusion. What you  
24 suggested is that if we invest the 400 and something  
25 thousand dollars which I computed for you, and you

1512

1 would earn \$27,000 a year. You're not paying the  
2 \$66,000 that I expected he would be earning, that's  
3 why I say you're \$40,000 a year short. If we were  
4 paying the full \$66,000 a year, this would be  
5 exhausted at the end of that time period.  
6 Q. You would pay out 40,000 a year of it  
7 over that period of time. You'd have to get the  
8 interest and pay it out also?  
9 A. That's right, that's right.  
10 MR. LISTON: Thank you for your help.  
11 THE WITNESS: Yes, sir.  
12 JUDGE CARLSON: Redirect, Mr. Merkel?  
13 REDIRECT EXAMINATION BY MR. MERKEL:  
14 Q. And Dr. Lee, to follow Mr. Liston's line  
15 of thinking there that we're going to pay him  
16 \$27,000 in earnings. But as you point out, we're  
17 going to have to take 40,000 of the 400,000 to get  
18 him back to the 66,000. Then that amount that's  
19 sitting in the bank earning interest is going down  
20 every year, too, isn't it?  
21 A. That's correct. If we were -- the  
22 adjusted income is \$44,000. If we paid that out  
23 every year, it would be exhausted at the end of  
24 2013.

25 Q. And in fact, in the second year, he

1513

1 wouldn't get 27,000 in earnings, he would get 27,000  
2 less the amount earned on the 44,000 that you took  
3 away from the previous year's total?  
4 A. That's correct. So it's a difference if  
5 you say we can pay him \$27,000 a year and still have  
6 money left over, that's correct. But if you pay him  
7 the 44,000 that he was due, you wouldn't have any  
8 left over.  
9 Q. And besides that, is there a way to do it  
10 that is appropriate and recognized by accountants  
11 and people in your profession as being the  
12 appropriate way to make a calculation like this,  
13 Dr. Lee?  
14 A. Yeah. This is the appropriate way I have

15 done. We can argue over the interest rate, what  
16 interest rate I have used. But as far as the  
17 methodology, this is the same methodology that  
18 everybody uses.

19 Q. And the methodology of taking away the  
20 3.2 percent from the 6.2 bond rate, is that also  
21 accepted by everyone as the appropriate way of  
22 getting a net discount rate?

23 A. It is. Some economists do try to break  
24 out inflation and productivity. They try to break  
25 those two areas out. I have not tried to do that.

1514

1 But it is essentially the same thing. It's just  
2 that they're breaking out two different the  
3 components.

4 Q. Now, Mr. Liston also asked you about the  
5 using the work life expectancy that you had there of  
6 23 years that would the get him to age 60. And ask  
7 you if, in fact, something caused him to work less  
8 time than that, then your figures would overstate  
9 the amount of the income, correct?

10 A. That's correct.

11 Q. If, on the other hand, you don't know  
12 Mr. Nunnally, at least the jury now has some idea of  
13 Mr. Nunnally from the evidence that's already come  
14 in. If the jury were to believe that he was very  
15 ambitious, very determined, hard working,  
16 industrious, all of these things and would work even  
17 longer than 65 years, how would we go about? If we  
18 worked him to age 65, how much would it add to your  
19 figures?

20 A. Again, I'd have to just sort of  
21 approximate that.

22 Q. If you could, as you did for Mr. Liston?

23 A. Let's see, I cut him off at age 60.6, and  
24 so if we used 65, that would be an additional 4.4  
25 years. Which added to the 12.6 would be a period of

1515

1 17 years, okay. So if I used 17 years at 44,636 as  
2 the payment, then for the future, that would be  
3 \$612,058, plus the past earnings of 494,121, and  
4 that's \$1,106,179.

5 Q. So if the jury were to assume that he  
6 would work to age 65, based on their knowledge of  
7 him, the figure would go up from 930,000 to  
8 1,106,000?

9 A. That's an approximation, yes.

10 MR. MERKEL: Thank you, Dr. Lee. That's  
11 all I had.

12 THE WITNESS: Yes, sir.

13 MR. MERKEL: May Dr. Lee be finally  
14 excused, Your Honor?

15 JUDGE CARLSON: Dr. Lee, you are finally  
16 excused.

17 MR. MERKEL: Your Honor, we'd call next  
18 Kable Nunnally.

19 KABLE NUNNALLY,  
20 having been first duly sworn, was examined and  
21 testified as follows:

22 DIRECT EXAMINATION BY MR. MERKEL:

23 Q. Hi, Kable.

24 A. Hi.

25 Q. Would you identify yourself, please, for

1516

1 the ladies and gentlemen of the jury and for the  
2 Judge behind you?

3 A. Kable Nunnally.

4 Q. And I assume, Kable, that you've never  
5 been in court before?

6 A. No, sir.

7 Q. The mic in front of you there, if you  
8 would kind of pull it around so that you can see --

9 A. All right.

10 Q. Where you'll be talking into it. Tell  
11 us, please, Kable, what relation you are to Joe  
12 Nunnally?

13 A. His son.

14 Q. And when were you born?

15 A. July 18th, 1979.

16 Q. So that would make you --

17 A. 20-years-old.

18 Q. 22 right now?

19 A. 20.

20 Q. 21?

21 A. 20.

22 Q. Haven't added that yet. And what are you  
23 doing at this time?

24 A. I work right at the moment, and I am  
25 attending Ittawamba Community College in the fall.

1517

1 Q. And what class or classification will you  
2 be in the fall?

3 A. I'll be a freshman.

4 Q. Now, tell us, if you would, Kable, a  
5 little bit about your schooling up to this point.  
6 Where did you go to high school?

7 A. I went to Southhaven High, and I went to  
8 Northwest Junior College for a year.

9 Q. You went there last year?

10 A. Yes, sir.

11 Q. And that would have been the school year  
12 of '99-2000?

13 A. Yes, sir.

14 Q. I'd like to take you back a little in  
15 time, Kable, to back when your dad was -- was here.  
16 And kind of tell the jury, a little bit, if you  
17 would, about your father, about your relationship  
18 with him and what all you remember about him.

19 A. Well, we had a real good relationship.  
20 He worked a lot. I mean, I saw him on weekends.  
21 He'd come watch my sports games, soccer. I played  
22 baseball a little bit. I remember one time he took  
23 me to work with him, like a father-son workday to  
24 just show me what it was about, what all he did.

25 Q. What did he -- what did your dad think

1518

1 about work? What did he get across to you about how  
2 he felt like what you owed on a job and so forth?

3 A. Well, he told me that I needed to work to  
4 make a living, and that's how you get by. I mean,  
5 it was real important to work hard.

6 Q. As far as your dad's leisure time  
7 activities, what kinds of things did he like to do,  
8 Kable?

9 A. Well, we went camping and skiing a whole  
10 lot on the weekends.

11 Q. Tell us about that, a little bit. How  
12 would you -- what kind of camping outfit would you  
13 take, and how would you do that?

14 A. Well, my mom, and my brother and my two  
15 sisters, we'd leave on the weekend or Friday. And  
16 my dad would come down Saturday night and cook out,  
17 and we'd go skiing a little bit. And then Sunday  
18 morning we'd wake up, ski -- it was a family thing.  
19 It was mostly our vacation. That's how we did a  
20 family trip.

21 Q. Did you have a camper trailer or what  
22 kind of --

23 A. No, we camped out in a tent. We had this  
24 one little spot that we went to all the time. I  
25 can't remember the name of it. But we went there

1519

1 every time we went camping, so it was kind of  
2 familiar to me.

3 Q. In your sports, was your dad involved and  
4 interested in your sports at that age?

5 A. Yes, sir, he came to my soccer games a  
6 lot, whenever he could, baseball games, he came to a  
7 couple. I only played like a year or so.

8 Q. You didn't play baseball that long?

9 A. Two seasons, I believe.

10 Q. Do you recall, Kable, when you first  
11 learned that your father was ill?

12 A. I'm not too sure.

13 Q. I don't mean a date. But I mean just in  
14 general, do you recall learning about that?

15 A. Oh, yes, sir.

16 Q. What were you led to understand about it?  
17 What did you find out about his illness?

18 A. Well, I know it was caused -- I know he  
19 had cancer of the lung, and it was caused from  
20 smoking.

21 Q. Did they tell you what the outlook for  
22 him was when you first learned about that?

23 A. That it wasn't going to be good. I mean,  
24 cancer was serious. That's about all I know. I was  
25 young.

1520

1 Q. But you knew from the very beginning that  
2 it was not -- not likely to be a good outcome?

3 A. Yeah, it wasn't a good thing.

4 Q. How did that effect you, and your  
5 brothers and sisters that were old enough to know?  
6 How did you spend your time with him from the time  
7 you found that out, until he ultimately passed away?

8 A. We spent all the time we could with him.  
9 You know, we were still in school. We had -- we  
10 were playing sports. So just every chance we got,  
11 we hung -- we did stuff with him.

12 Q. Were you with him when he passed away?

13 A. Yes, sir, we were on vacation in Florida.

14 Q. After he was gone, Kable, tell the jury  
15 what -- what your mother did in order to raise the  
16 four of you and take care of you.

17 A. She went -- she went to work. I don't  
18 exactly know how she did it. I don't understand to  
19 this day how she does it right now. So it had to  
20 have been hard on her, losing him and then having to  
21 raise all us.

22 Q. Did -- were you able to observe her and  
23 tell how it -- how it effected her emotionally and  
24 mentally?  
25 A. I could tell. But she had to be strong  
1521  
1 for all of us, as well as for her, too. But I could  
2 tell that it bothered her a whole lot. I mean, it  
3 bothered us, too but --  
4 Q. Were there any particular times that you  
5 know over the years were very hard for her since  
6 this happened?  
7 A. The first couple of years were probably  
8 the hardest ones. I can remember we shared nights,  
9 like me and my brother would stay in my mom's bed.  
10 Like one night my sisters would stay the other  
11 night, probably for two or three years after that  
12 just so she wouldn't have to be alone.  
13 Q. Was your mom concerned about being alone?  
14 Did that seem to bother her more than that working  
15 did?  
16 A. I know it was hard on her. You can say  
17 it bothered her, yeah. Losing him, yeah, it was  
18 important to all of us. That was our income.  
19 That's how we had our life. That's --  
20 Q. But apart from income, it was also hard?  
21 A. Definitely.  
22 Q. Did you guys, the ones of you old enough  
23 to, pitch in and try to help around the house, the  
24 yard and things?  
25 A. Yes, sir, like cut the yard and do  
1522  
1 housework, stuff like that. We did all we could.  
2 Q. Did you get any -- have to get any jobs  
3 yourself, as you were growing up?  
4 A. I started work when I was 16-years-old  
5 and still in school, so --  
6 Q. Did you work just during the summers?  
7 A. No, sir, I worked while I was attending  
8 school at Southhaven, and I pitched in as much I  
9 could to try to help her out.  
10 Q. Now, your mom has told us about the horse  
11 operation that she managed. Did you help in that?  
12 A. Yeah, like we had hay and feed, horses  
13 have to eat hay. We'd go pick up trailers full of  
14 hay, pick up feed, help her feed and water the  
15 horses, give them baths and brush them.  
16 Q. Is that stuff that has to be done fairly  
17 frequently?  
18 A. Yes, sir, just part of it.  
19 Q. The smaller children, your sisters, right  
20 after this happened, who took care of them while  
21 your mom was working? How was that handled?  
22 A. Well, we were all in school. And we got  
23 out basically the same time, so we were just all  
24 home alone for a little while before my mom got off  
25 work.  
1523  
1 Q. You being the oldest --  
2 A. Yes, sir.  
3 Q. -- were you sort of in charge of the  
4 others?  
5 A. Yes, sir.  
6 Q. Did that prevent you in a way from going

7 off with the guys and doing whatever after school?

8 A. Yes, sir.

9 Q. You play soccer, I think still, do you  
10 not?

11 A. Yes, sir.

12 Q. And are you playing in college?

13 A. I will be in August.

14 Q. Have there been times, Kable, over the  
15 years, when school events, and sporting events and  
16 things like that that you've felt a loss or a need  
17 for your father to participate in things that other  
18 guys had parents participating in?

19 A. Yeah, one particular time, my sister  
20 got -- I believe it was homecoming court for  
21 football, and I had to escort her out there. And  
22 everybody else's dad was out there doing it.

23 Q. Tell us a little about your father's  
24 personality, Kable.

25 A. He was real outgoing. He had a lot of  
1524

1 friends. I mean, he was real fun.

2 Q. Kind of guy that would rough house and  
3 carry on with you guys?

4 A. Yeah, yeah, and we'd wrestle around the  
5 house and stuff. He'd pick on us, you know, just  
6 playing around.

7 Q. If you got out of hand, how was he?

8 A. He got on us about the rules around the  
9 house. He didn't -- he didn't let anything get by  
10 him.

11 Q. Now, as far as present time, Kable, your  
12 mom was asked this morning if you had ever smoked,  
13 and she said she had seen you a time or two. Does  
14 your -- how does your mom feel about smoking?

15 A. She hates it. That's the bottom line.

16 Q. Do you do it at the house?

17 A. No, sir. I respect her too much. I  
18 don't -- not at all.

19 MR. MERKEL: Tender the witness, Your  
20 Honor. Thank you, Kable.

21 JUDGE CARLSON: Cross examination.

22 CROSS EXAMINATION BY MR. ULMER:

23 Q. Let me just ask a couple of questions,  
24 Kable.

25 A. Yes, sir.  
1525

1 Q. I understand that you're going over to  
2 Ittawamba Community College?

3 A. Yes, sir.

4 Q. Next year. Levi is already over there?

5 A. That's correct.

6 Q. And y'all are both going to be on  
7 scholarship playing soccer?

8 A. Yes, sir.

9 Q. And did Levi play over there last year?

10 A. Yes, sir, he did.

11 Q. Who's the better of the two soccer  
12 players, you or Levi?

13 A. I would have to say my brother.

14 Q. He's better?

15 A. He's stuck with it more than I have.

16 Q. Where does he play in the back, in the  
17 middle, up front?



18 A. He plays defense.  
19 Q. What about you?  
20 A. Same thing.  
21 Q. And you are now, I think you said,  
22 20-years-old?  
23 A. Yes, sir.  
24 Q. And when your dad died back in 1989, you  
25 would have been 10-years-old?  
1526  
1 A. Correct.  
2 Q. And I think he was -- had his diagnosis  
3 with cancer --  
4 MR. ULMER: I don't think I did it, Your  
5 Honor.  
6 JUDGE CARLSON: Faulty system. It acts  
7 up.  
8 Q. (By Mr. Ulmer) You were about  
9 nine-years-old, I think, at the time -- at the time  
10 that you learned about your father's illness?  
11 A. Yes, sir.  
12 Q. This case was filed in, I think, sometime  
13 in 1993. In 1993, you would have been, what, 13?  
14 A. Yes, sir.  
15 Q. About 13 years of age. Now, --  
16 MR. ULMER: I have nothing further, Your  
17 Honor, and I tender the witness. Thank you, sir.  
18 MR. MERKEL: Nothing further, Your Honor.  
19 We'd ask if he might be allowed to be discharged or  
20 remain in the courtroom.  
21 JUDGE CARLSON: Thank you, Kable. You  
22 are released and are welcome to stay in the  
23 courtroom.  
24 THE WITNESS: Thank you.  
25 JUDGE CARLSON: Let's go ahead and take a  
1527  
1 break, ladies and gentlemen. You've been in place  
2 almost an hour, and let's take a 10 minute break.  
3 (Jury exits courtroom.).  
4 (A short break was taken.)  
5 JOYCE GIDEON,  
6 having been first duly sworn, was examined and  
7 testified as follows:  
8 DIRECT EXAMINATION BY MR. MERKEL:  
9 Q. How are you this afternoon?  
10 A. I'm fine.  
11 Q. Would you identify yourself to the jury  
12 and the Court, please?  
13 A. Yes. I'm Joyce Gideon.  
14 Q. And Joyce, what relationship do you have  
15 to Kay Nunnally?  
16 A. She's my sister.  
17 Q. And tell us where you live, please.  
18 A. I live in [DELETED].  
19 Q. And how long have you lived in [DELETED]  
20  
21 A. About 21 years.  
22 Q. And has your sister been in this area  
23 generally most of that time?  
24 A. Yes, sir.  
25 Q. How many members were there in your  
1528  
1 family? How many other siblings did you have?  
2 A. Counting her, five others.

3 Q. And are all of them from this area?  
4 A. All but one sister.  
5 Q. Okay. Tell the jury, if you would, a  
6 little bit about your relationship with Kay, how  
7 close y'all are and so on.  
8 A. Well, we're -- as far as age, we're two  
9 years apart. How far back do you want me to go?  
10 Q. As far as your relationship growing up,  
11 whether you were close sisters, confided in each  
12 other, those types of things?  
13 A. In growing up, we shared a bedroom  
14 together. We lived in [DELETED] at that time. We  
15 both graduated from Hillcrest High School. We both  
16 attended Blue Mountain College for a short time.  
17 Then after I got married, I moved away for a short  
18 time. And then when I came back, well, that's when  
19 she met Joe. And they got married, and we just,  
20 family-wise, have been fairly close.  
21 Q. When did you first meet Joe?  
22 A. I don't --  
23 Q. And I don't necessarily mean the date by  
24 any means. But I mean as far as in the  
25 relationship? Was she already going with him, or  
1529  
1 was he still a manager and she an employee under him  
2 or --  
3 A. She met him when she became employed at  
4 McDonald's, and then I met him shortly after she was  
5 employed there.  
6 Q. So you were -- you knew him while they  
7 were dating, courting, whatever we want to call it?  
8 A. Uh-huh, for a short time, yes.  
9 Q. Describe Joe Nunnally to the jury if you  
10 would, please, Joyce.  
11 A. Very outgoing, friendly, about 5 --  
12 around 5' 10" I believe.  
13 Q. I don't mean physical, but more  
14 personality and type. Did you like Joe?  
15 A. Yes. He was very outgoing, very  
16 friendly.  
17 Q. When you saw this thing getting serious,  
18 how did you evaluate their relationship?  
19 A. As very good.  
20 Q. When they the began having children, did  
21 you have children about the same ages?  
22 A. Yes, I do.  
23 Q. How many do you have?  
24 A. I have five.  
25 Q. And going from high to low, what would be  
1530  
1 the range of your children's ages today?  
2 A. My oldest child is 23. Then I have a son  
3 22, my daughter, 21, a daughter 20, and a son 19.  
4 Q. So all of yours would be older than or  
5 about the age of Kable?  
6 A. Right.  
7 Q. And the younger Nunnally children would  
8 be below your children?  
9 A. No. B. K. is the only one that's under  
10 my youngest.  
11 Q. Okay. Did you -- the two families spend  
12 time together, I mean, as family units, dinners,  
13 reunions, picnics, things like this?

14 A. When the children were younger, we went  
15 on a lot of weekend camping outings to the area  
16 lakes here in northern Mississippi.  
17 Q. So your family would camp with their  
18 family --  
19 A. Yes, sir.  
20 Q. -- in the same general vicinity?  
21 A. Yes, we would.  
22 Q. Now, during those times, Joyce, were you  
23 able to -- well, did you notice whether Joe Nunnally  
24 smoked and to what extent?  
25 A. I know he smoked. As far as to what  
1531  
1 extent, I really never paid any attention to it.  
2 Q. Was smoking any kind of an issue at all  
3 back in those days between you and Joe, or Kay and  
4 Joe? I mean, was this any topic of conversation  
5 that you were used to hearing?  
6 A. No.  
7 Q. Do you smoke?  
8 A. No, I don't.  
9 Q. How about your husband?  
10 A. Yes, he does.  
11 Q. And how long has he smoked?  
12 A. Well, for the 18 and a half years that we  
13 have been married, he has smoked those 18 and a half  
14 years. Prior to that, I'm really not sure how long  
15 he has smoked.  
16 Q. Did you ever see your husband try to  
17 quit?  
18 A. Yes, I have.  
19 Q. How many times?  
20 A. He has tried to quit several times since  
21 1993.  
22 Q. And has he had any luck?  
23 A. Not to my knowledge of it.  
24 Q. How long is the longest you'll see him at  
25 any attempt to quit before he resumes?  
1532  
1 A. It's like right now he's trying to quit.  
2 Whether or not he has resumed, I don't know.  
3 Because since '94 and '95, he has not smoked in the  
4 home. And what he does at work, and when he is not  
5 around me, I do not know.  
6 Q. Do you have any idea why Joe Nunnally  
7 began smoking?  
8 A. No, I don't.  
9 Q. Didn't know him when he started?  
10 A. No, sir, I didn't.  
11 Q. Have any idea whether he ever tried to  
12 quit?  
13 A. No, I don't.  
14 Q. Now, when did you become aware that Joe  
15 was ill and had a serious problem?  
16 A. Right as he was diagnosed with cancer.  
17 Q. Who told you about it?  
18 A. My sister did.  
19 Q. And how did -- how was he affected by  
20 that news?  
21 A. Well, it was devastating, not knowing  
22 whether or not he would overcome it or not. I mean,  
23 it was just -- it was very hard.  
24 Q. Was she ever optimistic about that,

25 Joyce, or --

1533

1 A. When we heard that he was going to  
2 Houston for an operation, we were all very  
3 optimistic about it, and hoping that when it took  
4 place that it would -- the doctors would be able to  
5 get it all. Like they said that they thought that  
6 they would be able to.

7 Q. And after he came back, what were you  
8 able to observe, both about his condition and about  
9 her -- her mood, or attitude or so forth about the  
10 situation?

11 A. Well, they had been told that -- the  
12 doctors had told them that they thought that they  
13 had gotten it all. And it looked like everything  
14 would be -- be all right, and he should recuperate.

15 Q. And did he go back to work?

16 A. I don't remember. He went back sometime  
17 after his surgery. But exactly when, I don't know.  
18 I don't --

19 Q. Moving on up in time to when he  
20 ultimately passed away down in Florida, could you  
21 tell the jury your observations of your sister after  
22 that happened? What this did to her, what her  
23 concerns were and how she reacted?

24 A. Her concerns were of her children. How  
25 she was going to take care of them. Because she had  
1534

1 not really worked full-time that much when they were  
2 younger. And now all the financial burden fell on  
3 her, and the emotional burden for the children and  
4 all. It was all her responsibility now.

5 Q. Did she handle that, well, rationally, or  
6 were there periods when she was all to pieces and  
7 just unable to function very well because of being  
8 faced with that?

9 A. I would say she handled it very  
10 rationally. She more or less buried her life into  
11 the lives of her children. And whatever her needs  
12 were and all, they came last. The children came  
13 first.

14 Q. You say buried herself into them. As far  
15 as her activity schedule, what was it like?

16 A. She would go to work, leave work. If the  
17 children had any type of sports activities, she  
18 would go to the different sports activities of  
19 theirs. And come home to get them ready for bed,  
20 and go to bed, and get up the next day and do the  
21 same thing over.

22 Q. After Joe's death, did -- on up until  
23 today, has Kay had any what you might call adult  
24 social life?

25 A. Not that I know of other than when the  
1535

1 family gets together.

2 Q. Does she date, gone out, had any --  
3 whatever the word at this age is, not boyfriends,  
4 obviously, but any --

5 A. Not that I know of.

6 Q. Does she seem interested in that at all?

7 A. No, sir.

8 Q. Did she go places other than places where  
9 her kids are involved and performing as far as

10 getting out of the house?

11 A. She'll go to the movies with my sisters

12 and I, or to a ball game or something like that.

13 Q. In your opinion from living with your

14 husband -- does your husband have any health

15 problems because of smoking?

16 A. In '93, he had a heart attack. And the

17 doctor that he had said that it was more or less

18 caused from smoking.

19 MR. ULMER: Your Honor, this is hearsay.

20 We object to that, what the doctor said, we object

21 on the basis of hearsay.

22 JUDGE CARLSON: I sustain the objection.

23 Q. (By Mr. Merkel) Without regard to what a

24 doctor said, Ms. Gideon, does he have a problem that

25 he's been prescribed some activity that relates to

1536

1 smoking? Has he been told not to smoke by a doctor?

2 Let's say, without going into why or anything the

3 doctor said?

4 A. Yes, he has.

5 Q. And has he followed that advice?

6 A. He has tried to, but he has been unable

7 to do so.

8 Q. Why is that?

9 MR. ULMER: Your Honor, I object if he's

10 asking for an opinion. She's not qualified to give

11 an opinion on this subject.

12 JUDGE CARLSON: I sustain as to form of

13 the question.

14 Q. (By Mr. Merkel) Do you think your

15 husband, based on living with him and watching his

16 efforts, do you think he can quit smoking?

17 A. He hasn't yet.

18 Q. Do you think he tried, given it a good

19 effort?

20 A. I know he's tried.

21 Q. Do you think Joe Nunnally, based on your

22 knowledge of him, was addicted to cigarettes?

23 MR. ULMER: Your Honor, we object to

24 this. This calls for an opinion from a lay person

25 that she's not qualified to give.

1537

1 MR. MERKEL: Whether someone's addicted

2 to smoking?

3 JUDGE CARLSON: I sustain as to form of

4 the question. It can be rephrased.

5 Q. (By Mr. Merkel) How would you

6 characterize Joe Nunnally's use of cigarettes before

7 his death as compared to your husband's?

8 A. Near the same.

9 Q. If you had to describe your sister's

10 marriage to Joe Nunnally, how would you do that?

11 A. Very happy.

12 Q. Were they involved with and happy with

13 their children?

14 A. Yes, they were.

15 Q. How would you describe him as a father?

16 A. He was a very good father. He was very

17 devoted to his family.

18 MR. MERKEL: Tender the witness, Your

19 Honor.

20 JUDGE CARLSON: Cross examination.

21 CROSS EXAMINATION BY MR. ULMER:  
22 Q. Ms. Gideon, I just have a very few  
23 questions for you. Your father, he smoked, and he  
24 quit, did he not?  
25 A. Yes, sir.  
1538  
1 Q. And your mother, she smoked, and she  
2 quit, didn't she?  
3 A. Yes, sir.  
4 Q. And as far as your husband is concerned,  
5 I had understood that he was smoking on the order of  
6 four or five cigarettes a day at the time that he  
7 was deposed; is that correct or not?  
8 A. Sir, I don't know.  
9 Q. Okay.  
10 A. I never counted them.  
11 Q. Well, he doesn't smoke at home?  
12 A. No, he doesn't.  
13 Q. And you've -- you have five children. Do  
14 any of them smoke?  
15 A. Not at this time.  
16 Q. How many have smoked?  
17 A. Two that I know of.  
18 Q. And they have quit?  
19 A. They're no longer smoking. They're still  
20 using tobacco.  
21 Q. When you say "using tobacco," you mean --  
22 A. Dipping.  
23 Q. Dipping.  
24 MR. ULMER: I have nothing further, Your  
25 Honor. Thank you.

1539  
1 JUDGE CARLSON: Any redirect?  
2 MR. MERKEL: No questions.  
3 JUDGE CARLSON: Is Ms. Gideon finally  
4 released?  
5 MR. MERKEL: Please.  
6 JUDGE CARLSON: You are finally released,  
7 ma'am. You're free to go or free to stay here in  
8 the courtroom.  
9 THE WITNESS: Thank you.  
10 JUROR: Your Honor, I would like to state  
11 that I know of this witness.  
12 JUDGE CARLSON: Excuse me. Let me just  
13 find out, and let's see, you do and I think you do,  
14 too, ma'am. If necessary, I'll talk to you a little  
15 bit later on, but I appreciate you telling me that.  
16 JUDGE CARLSON: For the record, that  
17 would be 75, Ms. Rogers and 180, Mr. Pourciaux.  
18 MR. ROGERS: I know of her.  
19 MR. ULMER: Your Honor, we don't object  
20 to the fact that they know of Mrs. Gideon, Your  
21 Honor.  
22 LEVI NUNNALLY,  
23 having been first duly sworn, was examined and  
24 testified as follows:  
25 DIRECT EXAMINATION BY MR. MERKEL:

1540  
1 Q. It will do that.  
2 A. I guess so.  
3 Q. How are you today, Levi?  
4 A. Pretty good.  
5 Q. Introduce yourself, please, to the jury

6 and the Judge.  
7 A. My name is Levi Nunnally. I'm  
8 19-years-old.  
9 Q. Okay. And you are Joe and Kay Nunnally's  
10 middle child, I believe, or second child?  
11 A. Yes, sir.  
12 Q. Where are you now? Are you in school  
13 somewhere?  
14 A. Yes, sir, Ittawamba Community College.  
15 Q. And how long have you been there, Levi?  
16 A. Just this past year.  
17 Q. And where did you go to high school?  
18 A. Southhaven High.  
19 Q. Tell us a little bit about the things you  
20 did other than class work in school? Different  
21 things you were interested in and sports you may  
22 have played, things like that.  
23 A. I was into soccer my 9th, 10th, 11th,  
24 12th grade year. My 12th grade year, I played  
25 football, ran track in my 11th grade year.

1541

1 Q. Your brother has been on earlier, and  
2 he's told the jury that you're a better soccer  
3 player than he is; is that right?  
4 A. I don't know about that.  
5 Q. I'd like to take you back, Levi, to when  
6 you were eight-years-old or so and your dad was --  
7 well, before you were eight, anyway. Tell us a  
8 little bit about your father, as you remember him  
9 from the time -- the earliest memories you have of  
10 him as a little guy up until the time of his death?  
11 A. Well, things I remember the most are  
12 going out to camping, going to company picnics. Him  
13 helping me do things, like ride a bike.  
14 Q. Was he somebody, Levi, that you could  
15 count on if you needed him for teaching you things,  
16 helping you do things?  
17 A. Yes, sir.  
18 Q. What age did you begin playing team  
19 sports and organized sports?  
20 A. Since I can remember, like four.  
21 Q. Four or five, something like that. Was  
22 he involved in those things with you? Did he come  
23 to watch you when he played?  
24 A. When he could, when he had time, he came.  
25 Q. Did he have advice or tips to give you in

1542

1 them, or did he know anything at all about what you  
2 were playing?  
3 A. Well, I'm -- I'm not really sure he knew  
4 a whole lot about soccer. But he -- he did tell me  
5 to, you know, try my hardest and do my best.  
6 Q. As far as working and things like that,  
7 what was your father's attitude about you guys,  
8 whether you ought to work, and have jobs around the  
9 house, chores and things?  
10 A. Oh, we definitely had chores and things  
11 we had to do around the house.  
12 Q. As far as his jobs and his work, were you  
13 ever exposed to that, what he was doing? Did he try  
14 to teach you how -- what it meant to hold a job and  
15 how to apply yourself?  
16 A. I did go to work with him one day. And

17 he showed me what he did during the day, and how he  
18 went about his business. And how he did what he  
19 does at work.

20 Q. How important was work to your father?

21 A. A lot. He worked a whole lot.

22 Q. Worked pretty long hours?

23 A. That I can remember.

24 Q. Do you remember when you first learned  
25 that he was ill? I don't mean the date or anything.

1543

1 A. No --

2 Q. -- I just mean the occasion that you  
3 learned that he had a disease?

4 A. I really don't remember.

5 Q. How old would you have been in 1988?

6 A. '88? Seven.

7 Q. Seven. After he had been diagnosed and  
8 began having treatment, tell us what you can  
9 remember about that after he was sick.

10 A. Well, I remember going to the hospital  
11 and visiting him up there. Trying to spend as much  
12 time as I could with him.

13 Q. What did you understand about his  
14 situation, Levi, as far as what the outlook for it  
15 was probably going to be?

16 A. I -- I really don't remember. I was  
17 young and --

18 Q. After he passed away in Florida, tell us,  
19 in you would, a little bit about how -- how the  
20 family reacted to that? How all of you tried to  
21 cope with it, and particularly your mother?

22 A. We -- I know after we learned about his  
23 death -- we took -- we took a walk on the beach.  
24 And it was -- I just remember asking my mom how I  
25 thought -- how would we get by since we didn't

1544

1 have --

2 Q. Were you aware even at that age that  
3 things were going to be pretty tough to get by  
4 without your dad?

5 A. Yes, sir.

6 Q. Did you guys try to take up the slack and  
7 help your mother?

8 A. As much as we could.

9 Q. How would you describe your mother's  
10 efforts to take care of the four of you, Levi?

11 A. I don't see how she does it.

12 Q. Does she still put out the same effort  
13 today even with you guys now in college?

14 A. Yes, sir.

15 Q. How about the younger children? How  
16 did -- how were they taken care of while she was  
17 working and trying to earn money?

18 A. Well, I know -- I mean, I know they were  
19 going to school and -- I mean, she just did the best  
20 she could with all of us. Just gave us what we  
21 needed.

22 Q. Have you ever felt like you didn't have  
23 what you needed, Levi?

24 A. No, sir.

25 Q. Felt like you could do, and go with the

1545

1 gang that you ran with and do anything they did?



2 A. Yes, sir.  
3 Q. Have there been times as you were growing  
4 up when activities at school, other fellows had  
5 their dad's there for certain things, events and  
6 programs and all?  
7 A. Yes, sir.  
8 MR. MERKEL: I think that's all I have,  
9 Your Honor. Tender the witness.  
10 MR. ULMER: I have no questions, Your  
11 Honor.  
12 JUDGE CARLSON: Thank you, sir. You can  
13 step down. Is Levi finally released?  
14 MR. MERKEL: Yes, please, Your Honor.  
15 JUDGE CARLSON: You're welcome to stay if  
16 you like. Mr. Merkel.  
17 MR. MERKEL: Your Honor, I think next we  
18 would have a deposition of Dr. Rodgman that we, I  
19 believe, cleaned up and gotten where there are no --  
20 you want to be --  
21 JUDGE CARLSON: All right. Ladies and  
22 gentlemen, in a moment, we'll start deposition  
23 testimony. I know you went through that yesterday,  
24 so you know the procedure. And this very well could  
25 wrap us up for the week. I'm not positive. I think  
1546  
1 that might be the case. So somewhere along the way,  
2 we might take another short break if we need one.  
3 MR. DODSON: May I proceed?  
4 MR. ALDEN: I'm sorry.  
5 MR. ULMER: Does the reporter need to  
6 take this down? Because of a comment you made  
7 earlier today?  
8 JUDGE CARLSON: I mentioned to her at  
9 lunch what we had discussed earlier.  
10 MR. ALDEN: Can you tell me what page  
11 we're starting on?  
12 MR. DODSON: 42, line 14.  
13 (Rodgman deposition read into the  
14 record.)  
15 JUDGE CARLSON: Why don't we stop here.  
16 This would probably be a good place for a break.  
17 The jury has been in place for about an hour and 10  
18 minutes. Let's take a break, and we'll work on up  
19 until a good time to stop for the day and the  
20 weekend. So I'll give you a short break at this  
21 time.  
22 (Jury exits courtroom.)  
23 (A short break was taken.)  
24 (Continuation of the reading of the  
25 deposition of Rodgman.)  
1547  
1 MR. DODSON: That concludes it.  
2 JUDGE CARLSON: I'll pause here, ladies  
3 and gentlemen, and state to you that so far under  
4 our rules of civil procedure, the Plaintiff has  
5 offered certain portions of the deposition to be  
6 read into evidence. And before you now, based under  
7 our rules, the Defendant has the right to more or  
8 less cross designate portions of the same deposition  
9 to be offered into evidence, and that's what's being  
10 done right now. All right. Mr. Ulmer.  
11 MR. ULMER: Thank you, Your Honor.  
12 MR. ALDEN: Do you have Mr. Merkel's

13 copy?  
14 MR. ULMER: I do.  
15 (Continuation of Rodgman deposition.)  
16 JUDGE CARLSON: Excuse me just a minute.  
17 She needed a break. Just to let you have an idea,  
18 ladies and gentlemen, I've tried to time it. As  
19 best I can estimate, we ought to be through with  
20 this by 5:30, then we'll be taking that long break.  
21 Anybody else need a quick restroom break while we've  
22 got the pause?  
23 JUROR: She's sick, but the lady bailiff  
24 is checking on her.  
25 JUDGE CARLSON: Why don't we go ahead and  
1548

1 take a real short break. Hopefully about five  
2 minutes, and get you back in place. And we'll see  
3 how Ms. Winkler is, and we'll move on to conclusion  
4 here.  
5 (A short break was taken.)  
6 JUDGE CARLSON: All right. Ladies and  
7 gentlemen, as I mentioned just a moment ago, of  
8 course, we can go ahead and stop here. And we  
9 certainly want to make sure that Ms. Winkler is  
10 okay, so in a moment, I'll be able to put you in  
11 recess until next Wednesday. You have put in a full  
12 six days counting last Friday and then all of this  
13 week. So I know you're tired, everybody is tired.  
14 So let's go ahead and stop here. And we'll start  
15 back at 8:30 Wednesday morning and -- we'll go ahead  
16 and --

17 JUROR: Her daughter is an attorney  
18 somewhere in this area, sir.  
19 JUDGE CARLSON: Ms. Winkler's daughter is  
20 an attorney?

21 JUROR: Yes.  
22 JUDGE CARLSON: I think we found that out  
23 sometime in the examination process. Okay. In any  
24 event, then, you're tired, and you're ready to go,  
25 and I know it's -- we'll stop here. And we'll start  
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1 back at 8:30 Wednesday morning, July 5th. And  
2 certainly, again, we're going to be checking on  
3 Ms. Winkler. But I hope you all have a good, long  
4 safe 4th of July weekend. And the only thing I need  
5 to remind you of, please is is not discuss the case  
6 with each other or anybody else. And also lay aside  
7 any newspaper articles, if you would, until the case  
8 is over. So again, have a good and safe 4th, and  
9 we'll see you back here on Wednesday morning, July  
10 the 5th. Thank you very much.

11 (Jury exits courtroom.)  
12 (Time Noted: 5:11 p.m.)  
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